

STATE PERSONNEL BOARD CALENDAR



OCTOBER 3, 2005

SACRAMENTO, CALIFORNIA

State of California

Memorandum

DATE: September 23, 2005

TO: ALL INTERESTED PARTIES

FROM: STATE PERSONNEL BOARD – Executive Division

SUBJECT: Notice and Agenda for the **October 3, 2005**, meeting of the State Personnel Board.

PLEASE TAKE NOTICE that on October 3, 2005, at the offices of the State Personnel Board, located at 801 Capitol Mall, Room 150, Sacramento, California, the State Personnel Board will hold its regularly scheduled meeting. Pursuant to Government Code section 11123, a teleconference location may be conducted for this meeting at 320 W. 4th Street, Los Angeles, California.

The attached Agenda provides a brief description of each item to be considered and lists the date and approximate time for discussion of the item.

Also noted is whether the item will be considered in closed or public session. Closed sessions are closed to members of the public. All discussions held in public sessions are open to those interested in attending. Interested members of the public who wish to address the Board on a public session item may request the opportunity to do so.

Should you wish to obtain a copy of any of the items considered in the public sessions for the October 3, 2005, meeting, please contact staff in the Secretariat's Office, State Personnel Board, 801 Capitol Mall, MS 22, Sacramento, California 95814 or by calling (916) 653-0429 or TDD (916) 654-2360, or the Internet at:

<http://www.spb.ca.gov/calendar.htm>

Should you have any questions regarding this Notice and Agenda, please contact staff in the Secretariat's Office at the address or telephone numbers above.



P. Fong
Secretariat's Office

Attachment



CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall • Sacramento, California 95814 • www.spb.ca.gov

ARNOLD SCHWARZENEGGER, Governor



CALIFORNIA STATE PERSONNEL BOARD MEETING¹

801 Capitol Mall
Sacramento, California

Public Session Location – 801 Capitol Mall
Sacramento, California, Room 150
Teleconference – 320 West 4th Street²
Los Angeles, California, Suite 620

Closed Session Location – 801 Capitol Mall
Sacramento, California, Room 141
Teleconference – 320 West 4th Street
Los Angeles, California Suite 620

FULL BOARD MEETING – OCTOBER 3, 2005

¹ Sign Language Interpreter will be provided for Board Meeting upon request - contact Secretariat at (916) 653-0429, or CALNET 453-0429, TDD (916) 654-2360.

²Pursuant to Government Code section 11123, a teleconference location may be conducted for this meeting at 320 West 4th Street, Los Angeles, California.

FULL BOARD MEETING AGENDA³

OCTOBER 3, 2005
9:00 a.m. – 2:30 p.m.
(or upon completion of business)

PLEASE NOTE: ALL TIMES ARE APPROXIMATE AND ARE SUBJECT TO CHANGE

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

(9:00 a.m. – 9:45 a.m.)

1. **ROLL CALL**
2. **REPORT OF THE EXECUTIVE OFFICER – Floyd D. Shimomura**
3. **REPORT OF THE DEPARTMENT OF PERSONNEL ADMINISTRATION (DPA)
– DPA Representatives**
4. **REPORT ON THE PUBLIC EMPLOYEES RETIREMENT SYSTEM (PERS)
– Ron Alvarado**
5. **REPORT OF THE CHIEF COUNSEL – Elise Rose**
6. **NEW BUSINESS**

Items may be raised by Board Members for scheduling and discussion for future meetings.

7. **REPORT ON LEGISLATION – Sherry Hicks**

The Board may be asked to adopt a position with respect to the bills listed on the legislation memorandum attached hereto.

(9:45 a.m. – 10:15 a.m.)

8. **HEARING – SECOND PUBLIC HEARING ON PROPOSED REVISIONS TO
WHISTLEBLOWER RETALIATION COMPLAINT REGULATIONS
(Title 2, C.C.R., section 56 et. seq.) – Bruce Monfross**

³ The Agenda for the Board can be obtained at the following internet address:
<http://www.spb.ca.gov/calendar.htm>

(10:15 a.m. – 10:45 a.m.)

9. **HEARING – SECOND PUBLIC HEARING ON PROPOSED REVISIONS TO DISCOVERY REGULATIONS IN EVIDENTIARY HEARINGS REGULATIONS (Title 2, C.C.R., section 57 et. seq.) – Bruce Monfross**

BREAK

(10:45 a.m. – 11:00 a.m.)

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

(11:00 a.m. – 11:30 a.m.)

10. **ORAL ARGUMENT**

Oral argument in the matter of **MARK SAMORA, CASE NO. 04-3041A**
Appeal from dismissal. Instructional Technology Consultant. California State University, Los Angeles.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

(11:30 a.m. – 12:00 p.m.)

11. **EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, AND OTHER APPEALS**

Deliberations to consider matter submitted at prior hearing.
[Government Code Sections 11126(d), 18653.]

12. **DELIBERATION ON ADVERSE ACTIONS, DISCRIMINATION COMPLAINTS, AND OTHER PROPOSED DECISIONS SUBMITTED BY ADMINISTRATIVE LAW JUDGES**

Deliberations on matters submitted at prior hearing; on proposed, rejected, remanded, and submitted decisions; petitions for rehearing; and other matters related to cases heard by administrative law judges of the State Personnel Board or by the Board itself. [Government Code Sections 11126 (d), and 18653 (2).]

13. PENDING LITIGATION

Conference with legal counsel to confer with and receive advice regarding pending litigation when discussion in open session would be prejudicial.
[Government Code sections 11126(e)(1) and 18653.]

State Personnel Board v. Department of Personnel Administration,
California Supreme Court Case No. S119498.

State Personnel Board v. California State Employees Association,
California Supreme Court Case No. S122058.

Connerly v. State Personnel Board, California Supreme Court,
Case No. S125502.

International Union of Operating Engineers v. State Personnel Board,
Public Employment Relations Board (PERB) Case No. SA-CE-1295-S.

State Compensation Ins. Fund v. State Personnel Board/CSEA,
Sacramento Superior Court No. 04CS00049.

SEIU Local 1000 (CSEA) v. State Personnel Board,
Sacramento Superior Court No. 05CS00374.

The Copley Press, Inc. v. San Diego Superior Court,
California Supreme Court No. S128603.

Union of American Physicians and Dentists v. Department of Corrections, et al.,
United States District Court, Northern District of California.

14. RECOMMENDATIONS TO THE LEGISLATURE

Deliberations on recommendations to the legislature.
[Government Code section 18653.]

15. RECOMMENDATIONS TO THE GOVERNOR

Deliberations on recommendations to the Governor.
[Government Code section 18653.]

LUNCH

(12:00 p.m. – 1:00 p.m.)

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

(1:00 p.m. – 1:30 p.m.)

16. **HEARING – PERSONAL SERVICES CONTRACT #05-04:
CASE's Appeal of the Executive Officer's Decision**

Appeal of the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) from the Executive Officer's April 1, 2005 Approval of a Contract for Legal Services between the Secretary of State's Office and Renne & Holtzman Public Law Group, LLP

CLOSED SESSION OF THE STATE PERSONNEL BOARD

(1:30 p.m. – 1:45 p.m.)

17. **EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, AND
OTHER APPEALS**

Deliberations to consider matter submitted at prior hearing.
[Government Code Sections 11126(d), 18653.]

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

(1:45 p.m. – 2:15 p.m.)

18. **INTRODUCTION OF NEW EMPLOYEES – Maria Flores**

(2:15 a.m. – onwards)

19. **DISCUSSION OF COMING BOARD MEETING SCHEDULE OF
OCTOBER 18, 2005, IN SACRAMENTO, CALIFORNIA**

BOARD ACTIONS:

20. **ADOPTION OF THE STATE PERSONNEL BOARD SUMMARY MINUTES OF
AUGUST 9, 2005 AND AUGUST 30, 2005**
21. **EVIDENTIARY CASES - (See Case Listings on Page 10-16)**
22. **RESOLUTION EXTENDING TIME UNDER GOVERNMENT CODE
SECTION 18671.1 EXTENSION - (See Agenda Page 22-23)**

23. NON-EVIDENTIARY CASES - (See Case Listings on Page 17-19)

24. NON-HEARING CALENDAR

The following proposals are made to the State Personnel Board by either the Board staff or Department of Personnel Administration staff. It is anticipated that the Board will act on these proposals without a hearing.

Anyone with concerns or opposition to any of these proposals should submit a written notice to the Executive Officer clearly stating the nature of the concern or opposition. Such notice should explain how the issue in dispute is a merit employment matter within the Board's scope of authority as set forth in the State Civil Service Act (Government Code section 18500 et seq.) and Article VII, California Constitution. Matters within the Board's scope of authority include, but are not limited to, personnel selection, employee status, discrimination and affirmative action. Matters outside the Board's scope of authority include, but are not limited to, compensation, employee benefits, position allocation, and organization structure. Such notice must be received not later than close of business on the Wednesday before the Board meeting at which the proposal is scheduled. Such notice from an exclusive bargaining representative will not be entertained after this deadline, provided the representative has received advance notice of the classification proposal pursuant to the applicable memorandum of understanding. In investigating matters outlined above, the Executive Officer shall act as the Board's authorized representative and recommend the Board either act on the proposals as submitted without a hearing or schedule the items for a hearing, including a staff recommendation on resolution of the merit issues in dispute.

A. THE PRISON INDUSTRY AUTHORITY

proposes to make revisions to the Definition, Typical Tasks, Minimum Qualifications and Knowledge, Skills and Abilities sections to the Sales Order classification.

B. THE SECRETARY OF STATE'S OFFICE

proposes to return delegated examination and open temporary appointment (TAU) authorization to the Secretary of State's Office and rescind the requirement for SPB review and oversight of all examinations and open TAU appointments.

25. STAFF CALENDAR ITEMS FOR BOARD INFORMATION

NONE

26. CAREER EXECUTIVE ASSIGNMENT (CEA) CATEGORY ACTIVITY

This section of the Agenda serves to inform interested individuals and departments of proposed and approved CEA position actions.

The first section lists position actions that have been proposed and are currently under consideration.

Any parties having concerns with the merits of a proposed CEA position action should submit their concerns in writing to the Classification and Compensation Division of the Department of Personnel Administration, the Merit Employment and Technical Resources Division of the State Personnel Board, and the department proposing the action.

To assure adequate time to consider objections to a CEA position action, issues should be presented immediately upon receipt of the State Personnel Board Agenda in which the proposed position action is noticed as being under consideration, and generally no later than a week to ten days after its publication.

In cases where a merit issue has been raised regarding a proposed CEA position action and the dispute cannot be resolved, a hearing before the five-member Board may be scheduled. If no merit issues are raised regarding a proposed CEA position action, and it is approved by the State Personnel Board, the action becomes effective without further action by the Board.

The second section of this portion of the Agenda reports those position actions that have been approved. They are effective as of the date they were approved by the Executive Officer of the State Personnel Board.

A. REQUESTS TO ESTABLISH NEW OR REVISE EXISTING CEA POSITIONS CURRENTLY UNDER CONSIDERATION

CHIEF, OFFICE OF SELF INSURANCE PLANS

The Department of Industrial Relations proposes to allocate the above position to the CEA category. The Chief, Office of Self Insurance Plans (SIP) is responsible for organizing, planning and directing the statewide operation of SIP.

B. EXECUTIVE OFFICER DECISIONS REGARDING REQUESTS TO ESTABLISH NEW OR REVISE EXISTING CEA POSITIONS

DEPUTY DIRECTOR, OFFICE OF PROBLEM GAMBLING

The Department of Alcohol and Drug Program's proposal to allocate the above position to the CEA category has been disapproved effective July 29, 2005.

CHIEF, PUBLIC PARTICIPATION PROGRAM

The State Water Resources Control Board's proposal to allocate the above position to the CEA category has been approved effective September 7, 2005.

27. EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, & OTHER APPEALS

Deliberations to consider matter submitted at prior hearing. [Government Code sections 11126(d), 18653.]

NONE

28. PRESENTATION OF EMERGENCY ITEMS AS NECESSARY

29. BOARD ACTIONS ON SUBMITTED ITEMS – (See Agenda - Page 20-21)

These items have been taken under submission by the State Personnel Board at a prior meeting and may be before the Board for a vote at this meeting. This list does not include evidentiary cases, as those are listed separately by category on this agenda under Evidentiary Cases.

A D J O U R N M E N T

21. EVIDENTIARY CASES

The Board Administrative Law Judges conduct evidentiary hearings in appeals that include, but are not limited to, adverse actions, medical terminations, demotions, discrimination, reasonable accommodations, and whistleblower complaints.

A. BOARD CASES SUBMITTED

These items have been taken under submission by the State Personnel Board at a prior meeting. Cases that are before the Board for vote will be provided under separate cover.

(1) **PATRICK BARBER, CASE NO. 04-0174PA**

Appeal from dismissal

Classification: Youth Correctional Counselor

Department: Department of the Youth Authority

Proposed decision adopted November 3, 2004
modifying dismissal to 45 calendar days suspension

Transcript prepared

Pending oral argument June 7, 2005, Sacramento

Oral argument continued

Oral argument heard July 13, 2005, Sacramento

Case ready for decision by FULL Board

(2) **JON CHASE, CASE NO. 04-0392A**

Appeal from 30 working days suspension

Classification: Associate Management Auditor

Department: Employment Development Department

Proposed decision rejected April 19, 2005

Transcript prepared

Pending oral argument July 13, 2005, Sacramento

Oral argument continued

Oral argument heard August 9, 2005, Sacramento

Case ready for decision by FULL Board

(3) **INTERNATIONAL UNION OF OPERATING ENGINEERS, UNIT 12, LOCALS 3, 12, 39, & 501, CASE NO. 04-0813A**

[PSC File No. 04-002 (b)]

Review of personal services contract for maintenance and grounds keeping

Department: California Science Center

Proposed decision rejected June 21, 2005

Transcript prepared

Oral argument heard August 30, 2005, Los Angeles

Case ready for decision by FULL Board

(4) JOSEPH MARTINEZ, CASE NO. 04- 2690A

Appeal from dismissal

Classification: Hospital Police Officer

Department: Department of Mental Health

Proposed decision rejected May 17, 2005

Transcript prepared

Oral argument heard August 30, 2005, Los Angeles

Case ready for decision by FULL Board

(5) JAMES MCAULEY, CASE NO. 04-1856A

Appeal from dismissal

Classification: Associate Transportation Engineer, Caltrans (Registered)

Department: Department of Transportation

Proposed decision rejected March 8-9, 2005

Transcript prepared

Oral argument heard June 7, 2005, Sacramento

Case ready for decision by FULL Board

(6) ANDREW RUIZ, CASE NO. 04-2391A

Appeal from dismissal

Classification: Correctional Lieutenant

Department: Department of Corrections

Proposed decision rejected June 7, 2005

Transcript prepared

Oral argument heard August 30, 2005, Los Angeles

Case ready for decision by FULL Board

B. CASES PENDING

ORAL ARGUMENTS

These cases are on calendar to be argued at this meeting or to be considered by the Board in closed session based on written arguments submitted by the parties.

(1) MARK SAMORA, CASE NO. 04-3041A

Appeal from dismissal

Classification: Information Technology Consultant

Department: California State University, Los Angeles

C. CHIEF COUNSEL RESOLUTIONS

NONE

COURT REMANDS

This case has been remanded to the Board by the court for further Board action.

NONE

STIPULATIONS

These stipulations have been submitted to the Board for Board approval, pursuant to Government Code, section 18681.

NONE

D. ADMINISTRATIVE LAW JUDGE'S (ALJ) PROPOSED DECISIONS

PROPOSED DECISIONS

These are ALJ proposed decisions submitted to the Board for the first time.

- (1) JOSE L. ANDRADE, CASE NO. 05-0908**
Appeal from five percent reduction in salary for 12 months
Classification: Materials and Stores Supervisor I
Department: Department of Corrections
- (2) PRECILLA CALAUNAN, CASE NO. 05-1737**
Appeal from dismissal
Classification: Psychiatric Technician Assistant
Department: Department of Developmental Services
- (3) RUDY CHAVEZ & FELIPE RODRIGUEZ, CASE NOS. 05-1649 & 05-1873**
Appeal from terminations of Limited Term Appointments
Classification: Pre-Licensed Psychiatric Technician & Psychiatric Technician Assistant
Department: Department of Developmental Services
- (4) JOHN HILLEBRECHT, CASE NO. 05-0948**
Appeal from dismissal
Classification: Construction Inspector II
Department: Department of General Services

- (5) **MARIA HURTADO, CASE NO. 05-1515**
Appeal from dismissal
Classification: Psychiatric Technician
Department: Department of Developmental Services
- (6) **SPENCER PETERSON, CASE NO. 05-1476E**
Appeal from discrimination
Classification: Correctional Sergeant
Department: Department of Corrections and Rehabilitation
- (7) **KENNETH POWELL, CASE NO. 05-1473**
Appeal from 60 working days suspension
Classification: Correctional Plumber II
Department: Department of Corrections and Rehabilitation
- (8) **ALRETTA L. PUCKETT, CASE NO. 05-0540**
Appeal from dismissal
Classification: Key Data Operator (Range B)
Department: Department of Motor Vehicles
- (9) **TRACY THOMPSON, CASE NO. 05-0903**
Appeal from ten percent reduction in salary for 12 months
Classification: Parole Agent I, Adult Parole
Department: Department of Corrections
- (10) **MARCIA FAYE WALDOW, CASE NO. 05-1612**
Appeal from dismissal
Classification: Key Data Operator
Department: Employment Development Department
- (11) **GEORGE WOODS, CASE NO. 01-1908B**
Appeal for determination of salary, benefits and interest
Classification: Chief Engineer I (Correctional Facility)
Department: Department of Corrections

Proposed Decisions Taken Under Submission At Prior Meeting

These are ALJ proposed decisions taken under submission at a prior Board meeting, for lack of majority vote or other reason.

NONE

PROPOSED DECISIONS AFTER BOARD REMAND

NONE

PROPOSED DECISIONS AFTER SPB ARBITRATION

NONE

E. PETITIONS FOR REHEARING

ALJ PROPOSED DECISIONS ADOPTED BY THE BOARD

The Board will vote to grant or deny a petition for rehearing filed by one or both parties, regarding a case already decided by the Board.

- (1) LETICIA RIVERA, CASE NO. 05-0425P**
Appeal for whistleblower retaliation complaint
Classification: Staff Services Manager I
Department: Department of Health Services
- (2) LYNNE SYLVIA, CASE NO. 05-1223P**
Appeal from wrongful termination
Department: Department of Health Services
- (3) JULIO VALADEZ, CASE NO. 04-1943P**
Appeal from termination of Career Executive Assignment
Department: Department of Corrections

WHISTLEBLOWER NOTICE OF FINDINGS

The Board will vote to grant or deny a petition for rehearing filed by one or both parties, regarding a Notice of Findings issued by the Executive Officer under Government Code, section 19682 et seq. and Title 2, California Code of Regulations, section 56 et seq.

NONE

F. PENDING BOARD REVIEW

These cases are pending preparation of transcripts, briefs, or the setting of oral argument before the Board.

(1) PATRICK BRASS, CASE NO. 04-1952A

Appeal from dismissal

Classification: Youth Correctional Counselor

Department: Department of the Youth Authority

Proposed decision rejected July 26, 2005

Pending transcript

(2) GARY GARFINKEL, CASE NO. 98-3128RBA

Appeal for determination of back salary, benefits and interest

Classification: Deputy Attorney General IV

Department: Department of Justice

Proposed decision rejected July 13, 2005

Transcript prepared

Pending oral argument October 3, 2005, Sacramento

**(3) INTERNATIONAL UNION OF OPERATING ENGINEERS, UNIT 12, LOCALS 3, 12, 39, & 501, CASE NO. 04-0813A
[PSC File No. 04-002 (b)]**

Review of personal services contract for maintenance and grounds keeping

Department: California Science Center

Proposed decision rejected June 21, 2005

Transcript prepared

Pending oral argument August 30, 2005, Los Angeles

(4) MINAS MAROKI, CASE NO. 04- 2700A

Appeal from dismissal

Classification: Correctional Officer

Department: Department of Corrections

Proposed decision rejected August 9, 2005

Pending transcript

(5) JOSEPH MARTINEZ, CASE NO. 04- 2690A

Appeal from dismissal

Classification: Hospital Police Officer

Department: Department of Mental Health

Proposed decision rejected May 17, 2005

Transcript prepared

Pending oral argument August 30, 2005, Los Angeles

(6) KIM RITTENHOUSE, CASE NOs. 03-3541A & 03-3542E

Appeal from denial of reasonable accommodation
and from constructive medical termination

Classification: Office Technician (General)

Department: Department of Fish and Game

Proposed decision rejected May 18, 2004

Pending transcript

(7) ANDREW RUIZ, CASE NO. 04-2391A

Appeal from dismissal

Classification: Correctional Lieutenant

Department: Department of Corrections

Proposed decision rejected June 7, 2005

Transcript prepared

Pending oral argument August 30, 2005, Los Angeles

(8) MARK SAMORA, CASE NO. 04-3091A

Appeal from dismissal

Classification: Correctional Lieutenant

Department: Department of Corrections

Proposed decision rejected July 13, 2005

Transcript prepared

Pending oral argument October 3, 2005, Sacramento

23. NON-EVIDENTIARY CASES

A. WITHHOLD APPEALS

Cases heard by a Staff Hearing Officer, a managerial staff member of the State Personnel Board or investigated by Appeals Division staff. The Board will be presented recommendations by a Staff Hearing Officer or Appeals Division staff for final decision on each appeal.

WITHHOLD FROM CERTIFICATION CASES HEARD BY A STAFF HEARING OFFICER

NONE

WITHHOLD FROM CERTIFICATION CASES NOT HEARD BY A STAFF HEARING OFFICER

- (1) **JESUS ANQUIANO, CASE NO. 04-2234**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitted pertinent information, furnished inaccurate information and failed to meet legal obligations.
- (2) **DAVID CAMACHO, CASE NO. 04-2988**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitted pertinent and had a negative employment record.
- (3) **BENJAMIN CORTEZ, CASE NO. 04-2855**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitted pertinent information and furnished inaccurate information.
- (4) **SYLVIA COYT, CASE NO. 05-0040**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability and a negative law employment record.
- (5) **HENRY GARCIA, CASE NO. 04-2852**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitted pertinent information and a negative employment record.

- (6) **ROBERT HERNANDEZ, CASE NO. 04-2586**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitted pertinent information, negative driving record and negative law enforcement contacts.
- (7) **ROBERT HIRSCH, CASE NO. 05-0063**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitted pertinent information and had a negative employment record.
- (8) **RODRIGO HUESO, CASE NO. 05-0070**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitted pertinent information, furnished inaccurate information and had a negative employment record.
- (9) **JOSE IBARRA, CASE NO. 04-3015**
Classification: California Highway Patrol
Department: CHP Cadet
Issue: Suitability; omitted pertinent information and illegal drug use.
- (10) **CLAUDIO VELA, CASE NO. 04-2884**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitted pertinent information, furnished inaccurate information and had a negative employment record.

B. MEDICAL AND PSYCHOLOGICAL SCREENING APPEALS

Cases heard by a Staff Hearing Panel comprised of a managerial staff member of the State Personnel Board and a medical professional. The Board will be presented recommendations by a Hearing Panel on each appeal.

NONE

**C. EXAMINATION APPEALS
 MINIMUM QUALIFICATIONS
 MERIT ISSUE COMPLAINTS**

Cases heard by a Staff Hearing Officer, a managerial staff member of the State Personnel Board or investigated by Appeals Division staff. The Board will be presented recommendations by a Staff Hearing Officer or Appeals Division staff for final decision on each appeal.

EXAMINATION APPEALS

NONE

MINIMUM QUALIFICATIONS

NONE

MERIT ISSUE COMPLAINTS

NONE

**D. RULE 211 APPEALS
 RULE 212 OUT OF CLASS APPEALS
 VOIDED APPOINTMENT APPEALS**

Cases heard by a Staff Hearing Officer, or a managerial staff member of the State Personnel Board. The Board will be presented recommendations by a Staff Hearing Officer for final decision on each appeal.

NONE

E. REQUEST TO FILE CHARGES CASES

Investigated by Appeals Division staff. The Board will be presented recommendations by Appeals Division staff for final decision on each request.

PETITIONS FOR REHEARING CASES

NONE

SUBMITTED

1. TEACHER STATE HOSPITAL (SEVERELY), ETC.

Departments of Mental Health and Developmental Services. (Hearing held December 3, 2002.)

2. VOCATIONAL INSTRUCTOR (SAFETY)(VARIOUS SPECIALTIES)

Departments of Mental Health and Developmental Services. (Hearing held December 3, 2002.)

3. TELEVISION SPECIALIST (SAFETY)

The Department of Corrections proposes to establish the new classification Television Specialist (Safety) by using the existing Television Specialist class specification and adding "Safety" as a parenthetical to recognize the public aspect of their job, additional language will be added to the Typical Tasks section of the class specification and a Special Physical Characteristics section will be added. (Presented to Board March 4, 2003.)

4. HEARING – Personal Services Contract #04-03

Appeal of the California State Employees Association from the Executive Officer's April 15, 2004, Approval of Master Contracts between the California Department of Corrections and Staffing Solutions, CliniStaff, Inc., Staff USA, Inc., CareerStaff Unlimited, MSI International, Inc., Access Medical Staffing & Service, Drug Consultants, Infinity Quality Services Corporation, Licensed Medical Staffing, Inc., Morgan Management Services, Inc., Asereth Medical Services, and PrideStaff dba Rx Relief. (Hearing held August 12, 2004.)

5. HEARING

Proposed new and revised State Personnel Board Regulations effecting equal opportunity, discrimination complaints and reasonable accommodation policies and procedures. (Hearing held July 7, 2004.)

6. JAMES MCAULEY, CASE NO. 04-1856

Appeal from dismissal. Associate Transportation Engineer. Department of Transportation. (Oral argument held June 7, 2005.)

7. HEARING – Personal Services Contract #05-03

Appeal of SEIU Local 1000 (CSEA) from the Executive Officer's February 16, 2005 Approval of a Contract for Information Technology Services between the California Department of Health Services (DHS) and IDNS, Inc. (Hearing held July 13, 2005)

8. PATRICK BARBER, CASE NO. 04-0174A.

Appeal from dismissal. Youth Correctional Officer. Department of Youth Authority. (Oral Argument held July 13, 2005)

9. JON CHASE, CASE NO. 04-0392A.

Appeal from 30 working days suspension. Associate Management Auditor. Employment Development Department. (Oral Argument held August 9, 2005)

10. HEARING – PERSONAL SERVICES CONTRACT # 05-07

Appeal of Department of General Services (DGS) from the Executive Officer's April 22, 2005 Disapproval of a Proposed Three-Year Cost-Savings Contract with American Building Maintenance janitorial Services for Custodial Services for the Franchise Tax Board. (Hearing held August 9, 2005)

**11. INTERNATIONAL UNION OF OPERATING ENGINEERS,
UNIT 12, LOCALS 3, 12, 39, & 501, CASE NO. 04-0813A [PSC File No. 04-002 (b)]**

Review of personal services contract for maintenance and grounds keeping. California Science Center. (Oral Argument held August 30, 2005)

12. JOSEPH MARTINEZ, CASE NO. 04-2690A

Appeal from dismissal. Hospital Police Officer. Department of Mental Health. (Oral Argument held August 30, 2005)

13. ANDREW RUIZ, CASE NO. 04-2391A

Appeal from dismissal. Correctional Lieutenant. Department of Corrections. (Oral Argument held August 30, 2005)

NOTICE OF GOVERNMENT CODE SECTION 18671.1 RESOLUTION

Since Government Code section 18671.1 requires that cases pending before State Personnel Board Administrative Law Judges (ALJ's) be completed within six months or no later than 90 days after submission of a case, whichever is first, absent the publication of substantial reasons for needing an additional 45 days, the Board hereby publishes its substantial reasons for the need for the 45-day extension for some of the cases now pending before it for decision.

An additional 45 days may be required in cases that require multiple days of hearings, that have been delayed by unusual circumstances, or that involve any delay generated by either party (including, but not limited to, submission of written briefs, requests for settlement conferences, continuances, discovery disputes, pre-hearing motions). In such cases, six months may be inadequate for the ALJ to hear the entire case, prepare a proposed decision containing the detailed factual and legal analysis required by law, and for the State Personnel Board to review the decision and adopt, modify or reject the proposed decision within the time limitations of the statute.

Therefore, at its next meeting, the Board will issue the attached resolution extending the time limitation by 45 days for all cases that meet the above criteria, and that have been before the Board for less than six months as of the date of the Board meeting.

GOVERNMENT CODE SECTION 18671.1 RESOLUTION

WHEREAS, Section 18671.1 provides that, absent waiver by the appellant, the time period in which the Board must render its decision on a petition pending before it shall not exceed six months from the date the petition was filed or 90 days from the date of submission; and

WHEREAS, Section 18671.1 also provides for an extension of the time limitations by 45 additional days if the Board publishes substantial reasons for the need for the extension in its calendar prior to the conclusion of the six-month period; and

WHEREAS, the Agenda for the instant Board meeting included an item titled "Notice of Government Code section 18671.1 Resolution" which sets forth substantial reasons for utilizing that 45-day extension to extend the time to decide particular cases pending before the Board;

WHEREAS, there are currently pending before the Board cases that have required multiple days of hearing and/or that have been delayed by unusual circumstances or by acts or omissions of the parties themselves;

NOW, THEREFORE, BE IT RESOLVED AND ORDERED that the time limitations set forth in Government Code section 18671.1 are hereby extended an additional 45 days for all cases that have required multiple days of hearing or that have been delayed by acts or omissions of the parties or by unusual circumstances and that have been pending before the Board for less than six months as of the date this resolution is adopted.

* * * * *



1

(Cal; 10/03/05)

TO: Members
State Personnel Board

FROM: State Personnel Board - Legislative Office

SUBJECT: LEGISLATION

The status of major legislation being followed for impact on Board programs and the general administration of the State Civil Service Merit System is detailed in the attached report.

Any legislative action that takes place after the printing of this report, which requires discussion with the Board, will be covered during the Board meeting.

Please contact me directly should you have any questions or comments regarding this report. I can be reached at (916) 653-0453.

A handwritten signature in cursive script that reads 'Sherry Hicks'.

Sherry Hicks
Director of Legislation

Attachment



1

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FROM: State Personnel Board - Legislative Office

SUBJECT: LEGISLATION

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Sherry Hicks
Director of Legislation

Attachment

**STATE PERSONNEL BOARD
LEGISLATIVE TRACKING
REPORT
2005-06 SESSION**

**Status as of
September 19, 2005**



ASSEMBLY/SENATE BILLS
(Tracking)

BILL/ AUTHOR	BOARD POSITION	SUBJECT	STATUS OF BILL
AB 38 (Tran)	OPPOSE	AB 38 proposes suspending the salaries of specific state board and commission members for the fiscal years 2005 through 2009. The State Personnel Board is one of those boards that would not receive salaries for those fiscal years.	Assembly Business and Professions Committee. Died in Committee.
AB 47 (Cohn)	NEUTRAL	This bill would prohibit, except under specified circumstances, the Department of General Services from authorizing the Department of Corrections to enter into contracts for medical care services without seeking competitive bids for those contracts	Enrolled, To Governor.
AB 94 (Haynes)	NEUTRAL	Among other things, this bill would require various state agencies to prepare and provide a report to the Senate Committee on Rules, the Assembly Committee on Rules, and to each member of the Senate Committee on Budget and Fiscal Review and the Assembly Committee on Budget on the financial activities of the agency, board, commission, department, or office for the 2000-01, 2001-02, 2002-03, 2003-04 and 2004-05 fiscal years no later than January 15, 2006, and for each subsequent fiscal year by January 15 of the following year.	Assembly Business and Professions Committee. Failed passage. 2-year Bill.

AB 124 (Dymally)	SUPPORT	This bill would repeal requirements to annually establish employment goals and timetables based on race or gender that were invalidated by the California Court of Appeal in <i>Connerly v. State Personnel Board</i> , and re-title Chapter 12 of Part 2, Division 5, Title 2 of the Government Code from “Affirmative Action Program” to “State Equal Employment Opportunity Program”. In addition, it would strengthen equal employment opportunity requirements.	Enrolled, to Governor.
AB 194 (Dymally)		The Ralph M. Brown Act requires, with specified exceptions, that all meetings of a legislative body of a local agency be open and public and all persons be permitted to attend. This bill would remove the requirement that the legislative body be allowed to cure or correct an alleged violation prior to commencement of a legal action and would remove provisions that preclude specified actions from being determined to be null and void.	Assembly Committee on Local Government. Hearing cancelled at the request of author. (2-Year Bill).
AB 195 (Dymally)	NO POSITION	This bill would expand the remedies available to individuals who file discrimination complaints with the State Personnel Board by authorizing the State Personnel Board to award reasonable attorney’s fees and costs, including expert witness fees.	Enrolled, to Governor.

AB 219 (Nakanishi)		This bill would require all state departments, commissions, or other agencies to submit an electronic copy of each publication issued to the State Library. It would require the State Library to create and maintain a Web site that includes a monthly or quarterly list of each state publication issued during the immediately preceding month or quarter and that provides access to an electronic copy of each publication. It would provide that if a copy of a state publication is available on the State Library Web site, it shall be deemed distributed in compliance with specified redistribution requirements.	Senate Appropriations Committee. Held under submission.
AB 271 (BLAKESLEE)	OPPOSE	This bill would require that any person appointed to a scientist class in state service possess a four-year degree in a scientific discipline from an accredited university.	Assembly Inactive File. 2-year bill.
AB 277 (Mountjoy)	SUPPORT	This bill would authorize the Board of Administration of the Public Employees' Retirement System to hold closed sessions when considering matters relating to the development of rates and competitive strategy for long-term care insurance plans.	Enrolled, to Governor
AB 297 (Yee)	SUPPORT	This bill would specify that a current patient of a facility operated by the state Department of Mental Health (DMH) cannot file charges against a state employee, but rather must use the grievance processes of the DMH.	Chaptered. Chapter #217
AB 529 (Goldberg)	NEUTRAL	This bill would amend existing law to permit CSU employees to request hearings by the State Personnel Board (SPB) when CSU trustees: (1) fail to comply with their obligation to apply for disability retirement on behalf of an employee as required under existing law and (2) deny a request for reasonable accommodation.	Enrolled, to Governor

AB 775 (Yee)	SUPPORT	This bill would prohibit any state or local governmental agency, or any public or private agency, organization, entity, or program that receives state funding, from using any child, or permitting any child to be used, as an interpreter, as defined, in any hospital, clinic, or physician office in the context of diagnosis and treatment, except as specified. The bill would require each such agency, organization, entity, or program that receives state funding to have in place, and available for inspection, an established procedure for providing competent interpretation services that does not involve the use of children, as defined, in this manner. This bill contains other related provisions and other existing laws.	Senate Judiciary Committee. Failed passage. Reconsideration granted. Hearing cancelled at the request of the author.
AB 836 (Huff)	NEUTRAL	Existing law requires every state agency and court for which an appropriation is made to submit to the Department of Finance for approval, a complete and detailed budget setting forth all proposed expenditures and estimated revenues for the ensuring fiscal year. This bill would require that these budgets utilize a zero-based budget method, as defined.	Assembly Budget Committee 2-year Bill.
AB 884 (Baca)	NEUTRAL	This bill would prohibit a state agency, including the California State University, from employing a primary care physician as an independent contractor when there is an unfilled, full-time primary care physician position available within the state agency, unless the state agency is unable to do so after a good faith effort.	Senate Appropriations Committee. Held under submission.

AB 1066 (Horton, Jerome)	NEUTRAL	This bill would amend existing law to provide that a state agency: (1) may not pay a contractor under a cost-savings contract until the State Personnel Board (SPB) had first approved that contract and all administrative appeals have been exhausted or waived; (2) may not seek to enter into a cost-savings contract with a contractor if SPB disapproved a prior contract with that same contractor for the same services within the preceding 12 months; and (3) must give 10 days prior notice to Bargaining Unit 12 of any contract the agency intends to enter into that may affect that bargaining unit.	Enrolled. To Governor
SB 165 (Speier)	NEUTRAL	This bill would create the Office of the Special Counsel (OSC) as a separate branch of the State Personnel Board (Board), to protect state employees and applicants for state employment who have been retaliated against as a result of their having made protected disclosures under the Whistleblower Protection Act (Government Code section 8547 <i>et seq.</i>).	Senate Appropriations Committee. (Suspense file. 2-year bill.)
SB 606 (Kehoe)	OPPOSE	This bill would authorize that the State Personnel Board may create a classification for full-time lifeguards that does not require completion of the basic training course established by the Commission on Peace Officers Standards and Training.	Senate Appropriations Committee (Suspense File. 2-yr bill)

SB 737 (Romero)		Among other things, upon request of the Governor, the State Personnel Board (SPB) could develop and implement cost-effective recruitment and merit-based selection processes to establish lists of qualified applicants for consideration by the Governor in filling any of the 36 identified positions	Chaptered. Chapter #10, Statutes of 2005.
SB 737 (Romero)		Among other things, upon request of the Governor, the State Personnel Board (SPB) could develop and implement cost-effective recruitment and merit-based selection processes to establish lists of qualified applicants for consideration by the Governor in filling any of the 36 identified positions	Chaptered. Chapter #10, Statutes of 2005.
SB 1095 (Chesbro)	NEUTRAL	<p>This bill would amend existing law by allowing the California Conservation Corps (CCC) exceptions to the current requirements relating to 1) procurement or management of motor vehicle fleets; 2) hire, lease, lease-purchase of property or facilities; 3) limited-term appointments; and 4) hiring-above-minimum salary adjustments.</p> <p>This analysis is limited to those provisions that directly impact the State Personnel Board (SPB). Specifically, the bill would allow CCC to extend limited-term (LT) appointments, beyond the current 2 years, to a maximum of 4 years, when authorized by SPB.</p>	Assembly Appropriations Committee. Suspense file.

(Cal. 10/03/05;)

TO: STATE PERSONNEL BOARD

FROM: BRUCE MONFROSS
Chief Counsel's Office

REVIEWED BY: ELISE ROSE
Chief Counsel

SUBJECT: SECOND PUBLIC HEARING ON PROPOSED REVISIONS TO
WHISTLEBLOWER RETALIATION COMPLAINT REGULATIONS
(TITLE 2, CALIFORNIA CODE OF REGULATIONS, §§ 56 ET SEQ.)

REASON FOR HEARING AND DISCUSSION:

State Personnel Board (SPB) staff is proposing to amend Title 2 of the California Code of Regulations §§ 56 through 56.8, which provide procedures for whistleblower retaliation complaints. The initial hearing on this matter was held in Los Angeles on August 30, 2005.

In addition, to encourage and solicit comments either in writing or verbally, these proposed amendments were made available to departments and other interested parties for a 45-day comment period, which ended August 22, 2005. This hearing is being held to provide opportunity for statements from those interested parties who were unable to attend the initial hearing.

The original Notice of Proposed Revision of Regulations and Statement of Reasons dated July 8, 2005 from the initial hearing are attached for the convenience of the members of the Board and the public. The full text and a discussion of the proposed amendments to these regulations are contained in these documents. Also attached are copies of the comments received by August 22, 2005.

SPB staff will give full consideration to the testimony received at each hearing along with the written comments received, and revise the proposed regulations as necessary.

Attachment: NOTICE OF PROPOSED REVISION OF REGULATIONS AND
STATEMENT OF REASONS DATED JULY 8, 2005



**NOTICE OF PROPOSED REVISION OF REGULATIONS
AND STATEMENT OF REASONS**

**California Code of Regulations
Title 2. Administration
Division 1. Administrative Personnel
Chapter 1. State Personnel Board
Article 4. Hearings and Appeals**

DATE: July 8, 2005

TO: ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND
MEMBERS OF THE GOVERNOR'S CABINET

SUBJECT: PROPOSED AMENDMENTS TO REGULATIONS CONCERNING
WHISTLEBLOWER RETALIATION COMPLAINT PROCEDURES

AUTHORITY:

Under authority established in Government Code (GC) § 18701, the State Personnel Board (SPB) proposes to amend Title 2 of the California Code of Regulations (2CCR) §§ 56 through 56.8, which provide procedures for whistleblower retaliation complaints.

REFERENCE:

These regulations are amended to implement, interpret, and/or make specific GC §§ 8547.8 and 19683.

PUBLIC HEARING:

Date and Time: August 30, 2005 from 9:30 to 10:00 a.m.

Place: The Westin Los Angeles Airport Hotel
Midway Room
5400 West Century Boulevard
Los Angeles, CA 90045

Purpose: To receive written or oral comments about this action.

WRITTEN PUBLIC COMMENT PERIOD:

The written public comment period will close Monday, August 22, 2005, at 5:00 p.m. This comment period allows time for SPB staff to provide copies of any written comments to the five-member State Personnel Board (Board) for their consideration at the time of the hearing. Any person may submit written comments about the proposed amendments. To be considered by the Board, the appropriate person identified below must receive written comments before the close of the public comment period.

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Retaliation Complaint Procedures
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Written comments may be submitted to Bruce Monfross at SPB, P.O. Box 944201, Sacramento, CA 94244-2010, or to bmonfross@spb.ca.gov, or faxed to his attention at (916) 653-4256.

In addition, after the August 30, 2005 hearing, SPB staff will review the testimony as well as the written and verbal comments and revise the proposed regulations as necessary. An additional time for public comment will be set aside during the October 4-5, 2005 meeting in Sacramento for those interested parties who are unable to attend the August 30, 2005 meeting in Los Angeles, or who have additional comments regarding any proposed revisions to the regulations.

AVAILABILITY OF PROPOSED TEXT AND STATEMENT OF REASONS/CONTACT PERSONS:

Copies of the express terms of the proposed action, the Statement of Reasons, and all of the information upon which this proposal is based are available upon request to Elizabeth Montoya. The rulemaking file is available for review during normal business hours at SPB, 801 Capitol Mall, Sacramento, CA 95814. Additional information or questions regarding the substance of the proposed action should be directed to Bruce Monfross as specified above. Questions regarding the regulatory process in conjunction with this regulation should be directed to Elizabeth Montoya at SPB, P.O. Box 944201, Sacramento, CA 94244-2010, or by telephone at (916) 654-0842 or TDD (916) 653-1498.

AVAILABILITY OF CHANGES TO PROPOSED TEXT:

If any substantial and sufficiently related changes are made to the text as a result of comments received during the public comment period, SPB will make the full text of the changed regulation(s) available for at least 15 days before the date the regulations is permanently amended.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW:

GC § 8547.8 authorizes state employees or applicants for state employment to file a complaint with SPB if the employee or applicant believes that he/she has been retaliated against in employment for having engaged in whistleblowing activities.

GC § 18701 authorizes the Board to prescribe, amend, and repeal regulations for the administration and enforcement of the Civil Service Act (GC §§ 18500 *et seq.*).

GC § 18214 provides that certain subject regulations adopted by SPB are exempt from specific procedures required by the Administrative Procedure Act (Chapter 3.5, commencing with GC § 11340 of Part of Division 3).

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Retaliation Complaint Procedures
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GC § 19683 authorizes SPB to investigate and conduct hearings concerning complaints of whistleblower retaliation filed by state employees or applicants for state employment.

Under existing regulations, any Notice of Findings issued by the Executive Officer regarding whistleblower retaliation complaints filed with SPB is based almost exclusively upon a review of written briefs and documentary evidence submitted by the parties. The proposed revised regulations will grant the Executive Officer the discretion to schedule any whistleblower retaliation complaint accepted by SPB for either an informal hearing before an administrative law judge (ALJ), or an investigation conducted by SPB staff. The assigned ALJ or SPB investigator(s) will have the authority to, among other things, subpoena records and other evidence and to question witnesses prior to submitting their findings and recommendations to the Executive Officer, after which the Executive Officer will issue a Notice of Findings. The assigned ALJ will also have the authority to convert the informal hearing to a formal evidentiary hearing if the circumstances warrant such action. In those cases where the Executive Officer concludes, based on the information presented, that no retaliation has been proven, the Notice of Findings will inform the complaining party that he or she has exhausted his or her administrative remedies, and can seek judicial relief pursuant to the provisions of GC § 8547.8(c). In those cases where the Executive Officer concludes that retaliation has been proven, those persons and/or entities found to have engaged in retaliatory acts will be apprised of their right to request a formal hearing regarding the findings of the Executive Officer. The Executive Officer shall have the discretion to prosecute any whistleblower retaliation complaint scheduled for a formal hearing before either an ALJ or the Board, but the complaining party shall also be entitled to be represented by a legal representative of his or her own choosing during that hearing.

IMPACT ON SMALL BUSINESSES:

No impact on small businesses is anticipated from the implementation of the proposed amendment. Implementing the proposed amendment will affect only state departments and current and prospective employees of state departments.

LOCAL MANDATE:

SPB has determined that the proposed action imposes no mandate upon local agencies or school districts and therefore requires no reimbursement pursuant to G.C. § 17561.

COST ESTIMATES OF PROPOSED ACTION:

Costs or Savings to State Agencies:

The proposed regulations will involve no additional costs or savings to any state agency.

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Impact on Housing Costs:

The proposal will not affect housing costs.

Costs or Savings in Federal Funding to the State:

No impact.

Costs or Savings to Local Agencies or School Districts Required to be Reimbursed:

No costs to local agencies or school districts are required to be reimbursed.

Other Nondiscretionary Costs or Savings Imposed on Local Agencies:

This proposal does not impose nondiscretionary costs or savings on local agencies.

Cost Impact on Representative Private Persons or Businesses:

SPB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

ASSESSMENT OF POTENTIAL ADVERSE ECONOMIC IMPACT ON BUSINESS:

SPB has made an initial determination that the proposed action will have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

ASSESSMENT REGARDING THE EFFECT ON JOBS/BUSINESSES:

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination, creation, or expansion of existing businesses or create or expand businesses in the State of California.

ALTERNATIVES STATEMENT:

SPB must determine that no reasonable alternative considered by SPB, or that has otherwise been identified and brought to the attention of SPB, would be more effective in carrying out the purpose for which this action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

FINAL STATEMENT OF REASONS:

It is anticipated that the proposed regulations will be filed with Office of Administrative Law pursuant to GC § 18214, under which no Final Statement of Reasons is required. However, if a Final Statement of Reason is prepared, copies may be obtained from the contact person or backup contact person when it becomes available.

Regulations Concerning Whistleblower
Retaliation Complaint Procedures
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**ACCESSING INFORMATION REGARDING THIS RULEMAKING FILE ON THE
STATE PERSONNEL BOARD WEBSITE:**

The text of the proposed amendment, the Notice of Proposed Amendment of Regulations and Statement of Reasons, and if prepared and when available for review, the Final Statement of Reasons, will be on SPB website at: www.spb.ca.gov.

STATEMENT OF REASONS:

The attached proposed revisions to the State Personnel Board's whistleblower retaliation complaint regulations represent an effort to modify, with those resources available to SPB, the existing whistleblower retaliation complaint process to make it more efficient and effective. Because the current Notice of Findings process is essentially limited to a documentary review, a substantial amount of time and resources can be devoted to the review process with no definitive results being reached, resulting in the Executive Officer ultimately recommending that the case be sent to a full evidentiary hearing to resolve the matter. It is anticipated that the revised informal hearing/investigative process should make the review process more efficient and less burdensome for all parties involved. In addition, recent legislation (Senate Bill 165, Speier – 2005) recognized that employees who are retaliated against for having reported improper governmental activities are required to obtain, at their own expense, legal representation to safeguard the employee's legal rights. The proposed revisions would permit the Executive Officer to serve as the prosecuting authority in those cases where he or she concludes that the reporting employee has been retaliated against. (It should be noted, however, that due to limited resources, the Executive Officer may not have the ability to serve as the prosecuting authority in all cases that he or she deems to be meritorious.)

/s/Laura M. Aguilera

Laura M. Aguilera
Assistant Executive Officer

Attachment: Proposed Text of Amended Regulation

REGULATIONS GOVERNING WHISTLEBLOWER RETALIATION COMPLAINTS

For this amendment, text added to the regulation is indicated by underline
and text deleted from the regulation is indicated by strikethrough.

TITLE 2. Administration DIVISION 1. Administrative Personnel CHAPTER 1. State Personnel Board SUBCHAPTER 1. General Civil Service Regulations

ARTICLE 4. Hearings and Appeals

§ 56. Whistleblower Retaliation Complaint Process.

Any state employee or applicant for state employment, or any employee or applicant for employment with a California Community College, who believes that he or she has been retaliated against in employment for having reported improper governmental activity, as that phrase is defined in Government Code Section 8547.2(b), or Education Code Section 87162(c), or for having refused to obey an illegal order or directive, as defined in Government Code Section 8547.2(e), or Education Code Section 87162(b), may file a complaint and/or appeal with the Board in accordance with the provisions set forth in Sections 56.1 - 56.8. For purposes of complaints filed by community college employees or applicants for community college employment, the local community college district shall be deemed the "appointing power."

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Sections 87162, 87164, Education Code; and Sections 8547.2, 8547.8, and 19683, Government Code.

§ 56.1. Requirements for Filing Whistleblower Retaliation Complaint with the Appeals Division of the Board.

An individual desiring to file a complaint of retaliation with the Board must adhere to the following requirements:

(a) Prior to filing his or her complaint with the Board, the complainant shall comply with all other filing requirements, if applicable, set forth in Government Code Section 19683.

(b) The complaint shall be filed with the Appeals Division within one year of the most recent alleged act of reprisal. The complaining party shall submit an original complaint and copy of all attachments, and enough copies of the complaint and attachments for the Appeals Division to serve each entity and

person alleged to have engaged in retaliatory conduct and against whom damages and/or disciplinary action is sought.

(c) All complaints shall be in writing.

(d) ~~Each complaint shall:~~

~~(1) identify the facts that form the basis of the complaint, including, but not limited to: the improper governmental activity that the complainant reported, or the illegal order or directive the complainant refused to obey; the date the complainant reported the improper governmental activity, or refused to obey the illegal order or directive; the person(s) to whom the complainant reported the improper governmental activity, or to whom the complainant stated that he or she would not obey the illegal order or directive; the improper personnel action, as defined in Government Code Section 8547.3(b), or Education Code Section 87163(b), the complainant experienced as a result of reporting the improper governmental activity, or refusing to obey an illegal order or directive; the date on which the improper employment action occurred; and all information that the complainant possesses that shows that the improper employment action occurred as a result of complainant's report of improper governmental activity, or refusal to obey the illegal order or directive;~~

~~(A) For purposes of this section, "improper personnel action" includes, but is not limited to, promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action; as well as intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command the complainant, for the purpose of interfering with the complainant's rights conferred pursuant to applicable statutes.~~

~~(2) include as attachments all non-privileged documents, records, declarations and other information in the complainant's possession, custody, or control that are relevant to the complaint of retaliation;~~

~~(3) include as an attachment a list of all documents or records relevant to the complaint of retaliation that are not in the complaining party's possession, custody, or control, but which he or she reasonably believes to be in the possession, custody, or control of the appointing power or any individually named respondent to the complaint;~~

~~(4) identify all respondents known to the complainant (i.e., the appointing power as well as all state civil service or community college employees alleged to have retaliated against the complainant), and identify the business address of each respondent named as a party to the complaint;~~

~~(5) have attached any complaints of retaliation previously filed with the appointing power concerning the same retaliatory acts alleged in the complaint filed with the Board, and a copy of the written response of the appointing power to the complaint, if such response has been provided to the complainant. If the appointing power provides a written response to any such previously filed complaint of retaliation to the complainant after the complaint has been filed with~~

the Appeals Division, the complainant shall file a copy of any response with the Appeals Division within 5 days of receipt of the written response;

~~(6) specify the relief and/or remedies sought, including any compensatory damages sought;~~

~~(7) If adverse action is sought against any individually named respondent, pursuant to the provisions of Government Code Section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto. If the material facts alleged are not within the personal knowledge of the complainant, the complaining party may be required to present supporting affidavits from persons having actual knowledge of the facts before acting upon the request for adverse action. Any failure to comply with the provisions of this section shall constitute a waiver on the part of the complainant to subsequently seek disciplinary action against any individually named respondent;~~

~~(8) include a sworn statement, under penalty of perjury, that the contents of the written complaint are true, or believed by the complainant to be true; and~~

~~(9) be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the complaint stating the reasons for good cause.~~

(d) Each complaint shall clearly identify the protected activity engaged in by the complainant, the specific act(s) of reprisal or retaliation alleged to have occurred, and the names and business address of the individual(s) and entities alleged to have committed the retaliatory act(s). Each complaint shall specify the relief and/or remedies sought against each entity or individual, including any compensatory damages sought.

~~(e) The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code Section 19575, when appealing a notice of rejection during probation, pursuant to Government Code Section 19175, when appealing a notice of medical action, pursuant to Government Code Section 19253.5, or when appealing a notice of non-punitive action, pursuant to Government Code Section 19585.~~

(e) If adverse action is sought against any individually named respondent, pursuant to the provisions of Government Code Section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto.

(f) Each complaint shall include a sworn statement, under penalty of perjury, that the contents of the written complaint are true and correct.

(g) Each complaint shall be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the complaint stating the reasons for good cause.

(h) The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code Sections 19575 or 19590, when appealing a notice of rejection during probation, pursuant to Government Code Section 19175, when appealing a notice of medical action, pursuant to Government Code Section 19253.5, when appealing a notice of non-punitive action, pursuant to Government Code Section 19585, or when appealing a notice of career executive assignment termination pursuant to Government Code Section 19889.2. Neither the remedies nor the relief available to a complaining party pursuant to the provisions of Government Code Sections 8547.8 or 19683, shall, however, be available to a party who raises whistleblower retaliation as either an affirmative defense or as a separate cause of action in any other Board hearing, unless that party has first complied with all filing requirements set forth in Section 56.1.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.3, 8547.8, 18670, 18671, 18675, 19175, 19253.5, 19572, 19583.5, 19585, 19683 and 19889.2; and Section 6129, Penal Code.

§ 56.2. Acceptance of Whistleblower Complaint; Notice; Findings of the Executive Officer.

(a) ~~Within 10 working days of receipt of the complaint, the Appeals Division Board shall initiate an investigation to determine if whether the Board it has jurisdiction over the complaint and to determine if whether the complainant meets the filing requirements set forth in Section 56.1. The Appeals Division Board shall also determine if whether the complainant has complied with all other requirements for filing a retaliation complaint, as set forth in Government Code Sections 8547-8547.12 and 19683 and/or Education Code Sections 87160-87164; and Section 56.1 of these regulations.~~

(b) ~~If the Appeals Division Board determines that all filing requirements have not been satisfied the complaint does not meet all filing requirements, it shall notify the complaining party in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party shall may thereafter be permitted to file an amended complaint within 45 10 working days of receipt service of the notice of non-acceptance of the complaint.~~

(c) ~~Within 10 working days of receipt of the amended complaint, the Appeals Division shall initiate an investigation to determine if the Board has jurisdiction over the amended complaint, and to determine if the amended complaint meets the filing requirements set forth in Section 56.1. For purposes of determining the one year limitation period, the date that the original complaint is filed with the Board shall be deemed the filing date for the amended complaint. If the Appeals Division determines that all filing requirements have not been satisfied, it shall notify the complaining party in writing that the amended complaint has been rejected and the reason(s) for that determination.~~

~~(d) If the Appeals Division accepts the complaint, it shall notify the complaining party in writing that the complaint has been accepted, and shall serve a copy of the complaint or amended complaint on all respondents named in the complaint. Service of the complaint or amended complaint on the appointing power may be accomplished by mailing a copy of the complaint or amended complaint, with a proof of service attached, to the business address of the executive in charge of the Department, Agency, District or Board, and/or to the Legal Office of the appointing power. Service of the complaint or amended complaint on the individually named respondents may be accomplished by mailing a copy of the complaint or amended complaint, with a proof of service attached, to the business address of each individually named respondent.~~

~~(e) Within 20 working days after service of notice of acceptance of the complaint, each named respondent shall file with the Appeals Division and serve on all named parties a written response to the complaint. The written response shall include specific and detailed factual information that refutes the complainant's allegations, and shall include all non-privileged documents, records, declarations and other information in the respondent's possession, custody, or control that are relevant to the complaint of retaliation. Each written response shall have attached a Proof of Service. Service of the response may be accomplished by mailing a copy of the reply to both the Appeals Division and the home or business address of the complaining party. Each written response shall be limited to no more than 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The respondent shall submit a separate document with the response stating the reasons for good cause. The Appeals Division may grant an extension of time in which to file a written response to the complaint upon a showing of good cause by the requesting party.~~

~~(f) If the complainant desires to file a written reply to the written response(s), he or she shall file the reply with the Appeals Division and serve a copy of the reply on all named parties to the complaint within 10 working days after service of the response(s) of the named respondent(s). Service of the reply may be accomplished by mailing a copy of the reply to the Appeals Division and the business address of each named respondent, with proof of service attached. Each written reply shall be limited to no more than 10 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the reply stating the reasons for good cause. The Appeals Division may grant an extension of time in which to file a written reply to any response received concerning the complaint upon a showing of good cause. The Appeals Division may, in its sole discretion, condition the granting of any such request for an extension of time upon the complainant's agreement to extend the 60 working day requirement for the issuance of a Notice of Findings for a period of time commensurate with the extension of time granted to the complainant to submit his or her written reply.~~

~~(g) Upon acceptance of any written responses, the Appeals Division shall continue its investigation, with or without a hearing, pursuant to Government~~

~~Code Sections 8547-8547.12 and 19683. In conducting the investigation, the Appeals Division may require any party to the complaint to submit whatever other information it deems necessary to investigate the complaint. For purposes of this section, the phrase "party to the complaint" is limited to the complaining party and/or any respondent named in the complaint.~~

~~(h) In those instances where any party to the complaint requests, pursuant to this Section, that the appointing power produce records or documents relevant to the complaint, and the appointing power asserts a privilege or exemption as to the records or documents requested, the following procedure shall apply:~~

~~(1) Within 5 working days of the appointing power invoking a privilege or exemption concerning the requested records or documents, either the requesting party or the appointing power may submit a request for review of the issue in writing to the State Personnel Board Chief Administrative Law Judge for resolution. The party submitting the matter to the Chief Administrative Law Judge shall, on that same day, notify the non-moving party, both telephonically and in writing, that the matter has been submitted for review by the Chief Administrative Law Judge;~~

~~(2) The requesting party and the appointing power and/or other named respondent shall submit written briefs to the Chief Administrative Law Judge, concerning the disputed documents, and indicating why the disputed documents should or should not be produced. Any such brief shall be filed within 5 working days of the date that notice of the dispute is first submitted to the Chief Administrative Law Judge;~~

~~(3) Except as set forth in subsection (4) of this subdivision, when submitting its brief concerning the disputed records or documents, the appointing power shall include a copy of the disputed records or documents for purposes of an in camera review by the Chief Administrative Law Judge, or his or her designee;~~

~~(4) In those cases where the appointing power and/or other named respondent declines to produce the requested documents for purposes of an in camera review on the grounds that such disclosure is not required by law, the appointing power shall cite the specific legal authority that renders the disclosure improper;~~

~~(5) The Chief Administrative Law Judge, or his or her designee, shall issue his or her decision concerning the disputed documents within 5 working days of receipt of the parties written briefs;~~

~~(6) If any party to the dispute disagrees with the decision of the Chief Administrative Law Judge, or his or her designee, they may file a petition for writ of mandate in the superior court, seeking an interlocutory review of that decision;~~

~~(7) The 60 working day period for the issuance of the Notice of Findings by the Executive Officer shall be tolled pending the resolution of any such dispute concerning the requested documents.~~

~~(i) Within 60 working days of service of the Board's notice of acceptance of the complaint, the Executive Officer shall issue and serve on complainant and each named respondent a Notice of Findings concerning the complaint of~~

retaliation, unless the 60-working day period has been waived or tolled under subsection (f) or (h) of this section.

~~(j) In those cases where the Executive Officer concludes that the complainant failed to prove the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall, except in those instances where the findings address jurisdictional and/or procedural matters, specifically address each allegation contained within the complaint.~~

~~(k) In those cases where the Executive Officer concludes that the complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named respondents deemed to have engaged in retaliatory acts toward the complainant. The Notice of Findings shall also, except in those instances where the findings address jurisdictional and/or procedural matters, specifically refer to the information offered both in support of, and in opposition to, each allegation contained within the complaint. If it is determined that any individual manager, supervisor, or other state civil service employee engaged in improper retaliatory acts, the Notice of Findings and the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct.~~

~~(l) In those cases where the Executive Officer concludes that material questions of fact exist concerning whether the complainant established retaliation for having engaged in whistleblowing activities, the Executive Officer may, in his or her sole discretion, assign the case to an evidentiary hearing before a Board Administrative Law Judge.~~

~~(m) The Notice of Findings shall inform each named party of his or her respective right to file a Petition for Hearing Before the Board, pursuant to the provisions of Section 56.3 and/or 56.4. However, in those cases where the Executive Officer issues a Notice of Findings assigning the matter to an evidentiary hearing pursuant to the provisions of subdivision (l), no party to the complaint shall be entitled to file either a Petition for Hearing before the Board, nor a Petition for Order of Remedies.~~

(c) Unless time is extended by the complaining party in writing, the Executive Officer shall, within 10 working days of receipt of the complaint or amended complaint, notify the complaining party of a decision to either:

(1) dismiss the complaint for failure to meet jurisdictional or filing requirements; or

(2) refer the case for investigation and/or an investigative hearing in accordance with the provisions of Section 56.3; or

(3) schedule the case for an informal hearing before an administrative law judge, in accordance with the provisions of Section 56.3.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Sections 87160-87164, Education Code; Sections 8547-8547.2, 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

§ 56.3. Petition for Hearing by Complainant Before the Board. Cases Referred to Investigation or Investigative Hearing.

~~(a) If the Notice of Findings concludes no retaliation occurred, the complainant may file a Petition for Hearing before the Board.~~

~~(b) A Petition for Hearing under this section must be filed with the Executive Officer and served on each named respondent(s) to the complaint within 30 days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with a proof of service attached, to the business address of each named party to the complaint.~~

~~(c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to those allegations, issues, defenses, or requests for relief raised in the written pleadings filed during the Notice of Findings process. Any allegation, issue, defense, or request for relief not raised in the written pleadings during the Notice of Findings process shall be deemed waived, except upon petition and determination by the Board of good cause.~~

~~(d) Each respondent named in the complaint shall be permitted an opportunity to submit a written opposition to the Petition for Hearing. Any written opposition to the Petition for Hearing shall be filed with the Board and served on the complainant no later than 20 days after the date the Petition for Hearing was served on the respondent.~~

~~(e) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.3(c), and whether the Notice of Findings is supported by substantial evidence.~~

~~(f) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer as its own decision in the matter.~~

~~(g) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution rejecting the findings of the Executive Officer and assign the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with those statutes and regulations governing the conduct of Board evidentiary hearings, and issue a Proposed Decision for the Board's review and consideration.~~

~~(h) The evidentiary hearing shall be based solely on those allegations, issues, defenses, and requests for relief raised by the parties in the written pleadings during the Notice of Findings process, except in those cases where the Board has determined, pursuant to subdivision (c) of this section, that good cause exists to permit the moving party to amend the pleadings. Any document submitted by any party as an attachment or exhibit to the written pleadings during the Notice of Findings process shall not be considered by the administrative law judge during the evidentiary hearing, unless each document is first introduced and deemed to be relevant and admissible evidence by the administrative law judge during the course of the evidentiary hearing. Each named respondent shall have the right to be represented by a legal representative of his or her own choosing during the hearing, and to present a defense to the allegations~~

~~contained in the complaint, separate and apart from the defense presented by any other named respondent.~~

~~(i) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.~~

(a) If the Executive Officer assigns a complaint for investigation or an investigative hearing, the Executive Officer or the assigned investigator(s) shall conduct the investigation and/or investigative hearing in the manner and to the degree they deem appropriate, and shall have full authority to question witnesses, inspect documents, and visit state facilities in furtherance of their investigations. All state agencies and employees shall cooperate fully with the investigators, or be subject to disciplinary action for impeding the investigation. The investigators shall have authority to take depositions, issue subpoenas, order the production of documents, and take any other action to ensure a fair and expeditious investigation and/or investigative hearing. The 60 working day period governing the issuance of the Notice of Findings set forth in Section 56.5(a) shall be tolled for any period of non-compliance by any party to the investigation or investigative hearing.

(b) The Executive Officer shall issue findings regarding the allegations contained in the complaint and a recommended remedy, if any, based on the investigation or investigative hearing, in accordance with the provisions of Section 56.5.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19582, 19583.5 and 19683, Government Code; and Section 6129, Penal Code.

§ 56.4. Petition for Hearing by Respondents Before the Board. Cases Referred to Informal Hearing Before an ALJ.

~~(a) Any named respondent found in the Notice of Findings to have engaged in retaliatory conduct may file a Petition for Hearing before the Board, contesting the findings of fact and conclusions regarding the legal causes for discipline and/or the penalty to be imposed.~~

~~(b) A Petition for Hearing must be filed with the Executive Officer and served on each named party to the initial complaint within 30 days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with proof of service attached, to the home or business address of each named party to the complaint.~~

~~(c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to those allegations, issues,~~

~~defenses, or requests for relief raised in the written pleadings filed during the Notice of Findings process. Any allegation, issue, defense, or request for relief not raised in the written pleadings during the Notice of Findings process shall be deemed waived, except upon petition and determination by the Board of good cause.~~

~~(d) The complainant shall be permitted an opportunity to submit a written opposition to the Petition for Hearing. Any written opposition to the Petition for Hearing shall be filed with the Board no later than 20 days after the date the Petition for Hearing was served on the complainant.~~

~~(e) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.4(c), and whether the Notice of Findings is supported by substantial evidence.~~

~~(f) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer as its own decision in the matter.~~

~~(g) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution assigning the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with those statutes and regulations governing the conduct of Board evidentiary hearings, and issue a Proposed Decision for the Board's review and consideration.~~

~~(h) The evidentiary hearing shall be based solely on those allegations, issues, defenses, and requests for relief raised by the parties in the written pleadings during the Notice of Findings process, except in those cases where the Board has determined, pursuant to subdivision (c) of this section, that good cause exists to permit the moving party to amend the pleadings. Any document submitted by any party as part of the written pleadings during the Notice of Findings process shall not be considered by the administrative law judge during the evidentiary hearing, unless each document is first introduced and deemed to be relevant and admissible evidence by the administrative law judge during the course of the evidentiary hearing. Each named respondent shall have the right to be represented by a legal representative of his or her own choosing during the hearing, and to present a defense to the allegations contained in the complaint, separate and apart from the defense presented by any other named respondent.~~

~~(i) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.~~

~~(j) Any Decision issued by the Board in accordance with this section shall be deemed a final decision of the Board, and the individual against whom any disciplinary action is taken as a result of that Decision shall not have any right of further appeal to the Board concerning that action, with the exception of a Petition for Rehearing.~~

(a) For those complaints assigned to an informal hearing before an administrative law judge, the Board shall serve notice of the informal hearing on all parties to the complaint a minimum of 30 days prior to the scheduled hearing

date. Service on each respondent shall be made at the respondent's business address. The notice shall:

(1) include a complete copy of the complaint with all attachments, and a copy of the statutes and rules governing the informal hearing; and

(2) require each named respondent to serve on the complainant and file with the Board, at least 10 days prior to the informal hearing, a written response to the complaint, signed under penalty of perjury, specifically addressing the allegations contained in the complaint.

(b) The informal hearing shall be conducted in conformance with those procedures set forth in Government Code Section 11445.10 et seq., and may in the discretion of the administrative law judge, include such supplemental proceedings, informal or formal, as ordered by the administrative law judge to ensure that the case is heard in a fair and expeditious manner. The administrative law judge shall have full authority to question witnesses, inspect documents, visit state facilities in furtherance of the hearing, and otherwise conduct the hearing in the manner and to the degree he or she deems appropriate. The informal hearing and any supplemental proceedings shall be recorded by the administrative law judge.

(c) Following the informal hearing and any supplemental proceedings, the administrative law judge shall issue findings for consideration by the Executive Officer regarding the allegations contained in the complaint, together with all recommended relief, if any, proposed to remedy any retaliatory conduct.

(d) The Executive Officer shall have the discretion to adopt the administrative law judge's findings and recommended remedies in their entirety; modify the administrative law judge's findings and recommended remedies; or reject the administrative law judge's findings and recommended remedies, and:

(1) issue independent findings after reviewing the complete record; or

(2) remand the case back to the administrative law judge for further proceedings.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Sections 8547.8, 11445.10 et seq., 11513, 18670, 18671, 18672, 18675, 19572, 19574, 19575, 19582, 19590, 19592 and 19683, Government Code; and Section 6129, and Penal Code.

§ 56.5. Decision Adopting the Notice of Findings. Findings of the Executive Officer.

~~If no Petition for Hearing is received pursuant to the provisions of Section 56.3 or 56.4, the Notice of Findings shall be deemed to be the Board's final Decision in the matter, and no named party to the action shall be deemed to have any right of further appeal to the Board.~~

(a) The Executive Officer shall issue a Notice of Findings within 60 working days of the date the Board accepts the complaint, unless the complaining party agrees, in writing, to extend the period for issuing the findings, or unless the time period is otherwise tolled or waived.

(b) In those cases where the Executive Officer concludes that the allegations of retaliation were not proven by a preponderance of the evidence, the Executive Officer shall issue a Notice of Findings dismissing the complaint. The Notice of Findings shall notify the complainant that his or her administrative remedies have been exhausted and that the complainant is free to file a civil complaint with the superior court pursuant to Government Code Section 8547.8(c).

(c) In those cases where the Executive Officer concludes that the complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named respondents deemed to have engaged in retaliatory acts toward the complainant. If the Notice of Findings concludes that any individual manager, supervisor, or other employee engaged in improper retaliatory acts, the Notice of Findings shall include the legal causes for disciplinary action under Government Code Section 19572 and the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct.

(d) The Notice of Findings shall inform any respondent found to have engaged in retaliatory acts of his or her right to request a hearing regarding the Notice of Findings. Any such request shall be filed with the Board and served on all other parties within 30 days of the issuance of the Notice of Findings. Upon receipt of a timely request for hearing, the Board shall, at its discretion, schedule a hearing before the five-member Board, or an evidentiary hearing before an administrative law judge, regarding the findings of the Executive Officer. If a timely request for hearing is not filed with the Board, the Notice of Findings shall be deemed the Board's final decision in the case.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671.1, 18675, 19572, 19574, 19575, and 19582, 19590 and 19683, Government Code; and Section 6129, Penal Code.

§ 56.6. Disciplinary Action for Proven Retaliatory Acts.

~~(a) In those cases where the Board issues a final Decision that finds that any a manager, supervisor, or other state civil service employee has engaged in improper retaliatory acts, the Board shall Order the appointing authority to place a copy of the Board's Decision in that individual's Official Personnel File. The Decision shall set forth the legal causes for discipline under Section 19572, and a statement of the penalty imposed on the individual. The appointing authority shall place the Decision in the individual's Official Personnel File within 30 days of the issuance of the Board's Order and shall to also, within that same time period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 days of the issuance of the Board's Order, notify the Board that it has complied with the provisions of this subdivision.~~

(b) In those cases where the Board issues a final ~~D~~decision that finds that any community college administrator, supervisor, or public school employer, has engaged in improper retaliatory acts, the Board shall ~~O~~order the appointing authority to place a copy of the Board's ~~D~~decision in that individual's official personnel record. ~~The appointing authority shall place the Decision in the individual's Official Personnel File~~ within 30 days of the issuance of the Board's ~~O~~order and ~~shall to~~ also, within 40 days of the issuance of the Board's ~~O~~order, notify the Board that it has complied with the provisions of this subdivision.

(c) Any ~~D~~decision, as described in subdivision (a) or (b), shall be deemed a final decision of the Board and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

(d) For purposes of this Section, the Board's decision is deemed to be final after:

(1) a request for hearing pursuant to Section 56.5(c) has not been timely filed with the Board; or

(2) 30 days has elapsed from the date that the five-member Board has issued a decision adopting or modifying the proposed decision submitted by an administrative law judge after an evidentiary hearing and a Petition for Rehearing concerning that decision has not been filed with the Board; or

(3) a decision has been issued by the five-member Board after a hearing before that body and no Petition for Rehearing concerning that decision has been filed with the Board.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 18710, 19572, 19574, 19582, 19583.5, 19590, 19592, and 19683, Government Code; and Section 6129, Penal Code.

§ 56.7. Consolidation with Other Hearings.

(a) In those cases where an appeal from adverse action, rejection during probationary period, medical action, or non-punitive action is consolidated with a whistleblower retaliation complaint, and the whistleblower retaliation complaint identifies specifically named individuals against whom damages or adverse action is sought pursuant to the provisions of Section 56.1 ~~(d)(7)~~ (d) and (e), each individually named respondent shall have the right to participate in the consolidated hearing in such a manner as to reasonably defend him or herself against the allegations contained in the whistleblower retaliation complaint. These rights shall include, but not be limited to:

(1) to be represented by a representative of his or her own choosing during the consolidated hearing;

(2) to present a defense on his or her own behalf concerning the allegations and issues raised in the whistleblower retaliation complaint, separate

and apart from any defense presented by the appointing power or any other named respondent;

(3) to conduct pre-hearing discovery concerning allegations and issues raised in the whistleblower retaliation complaint;

(4) to examine and cross examine witnesses concerning allegations and issues raised in the whistleblower retaliation complaint;

(5) to introduce and challenge the introduction of evidence concerning allegations and issues raised in the whistleblower retaliation complaint; and

(6) to present oral and/or written argument to the decision-maker concerning allegations and issues raised in the whistleblower retaliation complaint.

(b) In those cases where one or more individually named respondents have been joined in the consolidated hearing, the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Sections 8547.8, 11513, 18670, 18671, 18672, 18675, 19175, 19253.5, 19575, 19582, 19585, 19590 and 19683, Government Code.

§ 56.8. Discovery, Evidentiary Hearing Procedures and Representation by the Executive Officer.

~~The discovery provisions set forth in Section 57-57.4 shall apply to this section.~~

~~NOTE: Authority cited: Section 18701, Government Code.~~

~~Reference: Section 87164, Education Code; Sections 8547.8, 18671, 18672, 18672.1, 18673, 18675 and 19683, Government Code.~~

(a) The hearing conducted pursuant to Section 56.5(d), shall be conducted in accordance with the Board's rules of practice and procedure for the conduct of hearings before the five-member Board, or evidentiary hearings before an administrative law judge. Any proposed decision issued by an administrative law judge after an evidentiary hearing shall be subject to review by the five-member Board.

(b) The administrative law judge assigned to conduct the evidentiary hearing shall not be the same administrative law judge who conducted the informal investigative hearing in the case, unless all parties to the action request, in writing, that the same administrative law judge be assigned to conduct the evidentiary hearing.

(c) The discovery procedures set forth in Section 57 et seq., shall be applicable to those evidentiary hearings conducted pursuant to this section.

(d) The Executive Officer, or his or her designee, shall have the authority, in his or her discretion, to prosecute the complaint during a hearing before the

five-member Board, and/or during an evidentiary hearing before an administrative law judge. The Executive Officer, or his or her designee, shall have the discretion to present the case in the manner he or she deems to be appropriate, including, but not limited to, the issues to be presented, the evidence to be presented, and the witnesses, if any, to be questioned.

(1) The complaining party shall be permitted to also be represented by a representative of his or her own choosing during any hearing before either the five-member Board, and/or an administrative law judge, and shall be permitted to raise issues, present evidence, and question witnesses during those hearings where witness testimony is permitted.

(2) In those cases where the Executive Officer, or his or her designee prosecutes a case during an evidentiary hearing before an administrative law judge, the case shall be assigned to an administrative law judge from the Office of Administrative Hearings.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

From: "Ashbrook, Debra" <Debra.Ashbrook@cdcr.ca.gov>
To: <bmonfross@spb.ca.gov>
Date: 8/22/2005 1:10:47 PM
Subject: Written Public Comment: Whistleblower Regulations

Bruce,

I canvassed the attorneys in the employment law teams of this office and received the following additional comments:

Whistleblower Retaliation Complaint Procedures

As a preliminary matter the proposed amendments raise a number of issues that could generate possible conflicts of interests between co-respondents, as well as internally to the Board itself. For instance, the Board's Executive Officer (EO) will have the discretion to either schedule an informal hearing before an ALJ or simply convert the complaint into an "investigation" that will be conducted by SPB staff. However, nowhere in the proposed amendments are there set forth the criteria that will be used by the EO in making his determination. In addition, the ALJ also will have the discretion to convert an informal hearing into a formal evidentiary hearing if the circumstances warrant it. Once again, no criteria are set forth explaining under what circumstances such a conversion can be made. Nor is there an explanation of what happens to the information gathered during the informal hearing. If the Notice of Findings (NOF) determines that there is no merit to the complaining party's allegations, it is unknown what, if any, preclusive effect these proceedings will have on any future litigation that may be pursued by the Complainant.

Finally, there is a provision giving the EO the discretion to prosecute any whistleblower retaliation complaint that is scheduled for a formal hearing before either an ALJ or the Board. At the same time the EO is going forward, the complainant can hire his own attorney during the hearing. This effectively gives the complainant two shots at the same apple. This would seem to be a violation of the hiring authority's due process rights. Even the Department of Fair Employment and Housing does not give a complainant that right before the Fair Employment and Housing Commission in cases brought pursuant to the Fair Employment and Housing Act. Therefore, the Board should not give a complainant this right in cases brought under the Whistleblower Protection Act.

Assessment Regarding the Effect on Jobs/Businesses

The Board opines that the proposed amendments will neither create nor

eliminate jobs nor result in the elimination, creation or expansion of existing jobs within the State. However, these amendments do create the very real potential of causing state agencies to expand their existing legal staff if the number of whistleblower complaints goes up when the Board starts prosecuting them. In addition, the Board itself is going to have to hire more legal staff in the wake of these amendments just to handle the initial analyses, to determine if the particular complaint merits the EO stepping in to prosecute the complaint. In addition, it is not likely that the existing Administrative Law Judges (ALJs) will be able to do their usual work and pick up the additional workload in this new process. Therefore, these revisions do create the necessity for enhanced staffing at the Board and in the state departments.

Statement of Reasons

The Board is anticipating that the revised informal hearing/investigative process should make the review process more efficient and less burdensome for all parties involved. To the contrary, a more protracted process may be created as ALJ's shift from informal hearings to formal ones. In addition, it appears that the move behind giving the EO the discretion to prosecute certain cases is to keep the litigation cost for individual employees down because they have to hire private counsel. The Board realizes that the EO may not be able to prosecute every case he deems to be meritorious because of limited resources. Perhaps this is an opportunity to implement a filing fee for all cases appealed to the Board to help defray those costs. A modest sum, say around \$100, would not chill anyone's free speech rights, considering the fact that filing in Superior Court will cost them over \$300 just to get in the door.

Section 56: Whistleblower Retaliation Complaint Process

No amendments.

Section 56.1: Requirements for Filing Whistleblower Retaliation Complaint

These amendments appear to force a complaining party to focus his/her complaint. These amendments will help move the litigation along, provided the Board strictly enforces the filing requirements.

Section 56.2: Acceptance of Whistleblower Complaint

Subsection (a) changes the entity that will have the authority to determine the Board's jurisdiction from the Appeals Division to the Board itself. The only question is whether the Board will now be taking formal action at its bi-monthly meetings to accept the complaints.

Subsection (b) is a bit more complicated. The Board is now going to determine if the complaint meets all the filing requirements and if not it will be sent back to the complainant to amend. If the complaint is rejected then a written statement of reasons must be generated. However, there is not a specified time frame regarding how long the Board has to make this determination. This is to be contrasted to the 10 working day requirement for the Board to determine if it has "jurisdiction" over the complaint as set forth in subsection (a). This subdivision also is silent on who is going to send out the notification letter. If the EO is going to do it then it would seem to create a conflict of interest if he later decides that the complaint is one that he wants to prosecute. In addition, if the complaint is sent back to the complainant, the regulation says that s/he "may" have 10 working days to file an amended complaint. Thus, the statement of reasons that must accompany this notice really amounts to the Board providing legal advice to the complainant so the complaint can be cleaned up.

There is a problem with the use of the word "may": There are no criteria set forth as to how this determination is made. Thus, it is a subjective decision that will be made by someone at the Board. In addition, once again there is the issue of who is going to make this determination, which raises the conflict of interest issue if the EO makes that determination and later decides to prosecute a particular case.

Subsection (c) provides that the EO has 10 working days to notify the complainant of what he intends to do. Is this the same 10 days outlined in subsection (a), or does the time begin to run again after the complaint is resubmitted? In other words, if the complaint is rejected, but the complainant is allowed to amend the complaint, does the 10 day time period for the EO review begin to run again? It appears that the 10 days provided to the complainant in subsection (b) does not count toward the EO's 10 days.

Section 56.3: Cases Referred to Investigation or Investigative Hearing

This is an area that has the potential for causing the greatest problems. First, it provides that the EO has the power to investigate complaints. This raises the conflict question again. Second, all state agencies and employees are required to fully cooperate with the investigators or be subject to discipline. Thus, one of the biggest areas of contention will probably be who gets to make the decision if everyone is fully cooperating

and who is going to ensure that everyone's due process rights will be protected. A third issue is created because the investigator is empowered to issue subpoenas to get the information s/he wants, but there is no compliance time given to honor the subpoena. Fourth, who represents the employees if depositions are taken? This becomes very problematic because there is a conflict between the hiring authority and the employee, since adverse action can be taken against the employee found to be engaging in improper activity if the Board sustains the complaint. The hiring authority cannot defend someone at a deposition if later on it may have to take an adverse action against him or her. Fifth, what criteria are used to assign the matter out to conduct an investigation or "investigative" hearing versus referring the matter out to an ALJ pursuant to Section 56.4?

Sixth, there is a built in tolling of the 60 working day period regarding issuance of the Notice of Findings if a "party" is not cooperating. Who gets to decide how a party is designated, especially if the complainant does not do so somewhere in his/her complaint? Also, who gets to decide what constitutes cooperating with the investigation or investigative hearing? There should be standards.

Seventh, what role does the Hiring Authority's attorney get to play in all of this? For instance, do we get to make objections to improper questions for the record? Do we get to instruct employees not to answer certain questions, because they invade the attorney-client privilege? Do we get to cross-examine witnesses? Do we get to put on our own witnesses or is everything going to be driven by the investigator?

Eighth, how can the Board toll a statutory time frame by regulation?

Ninth, is the information gathered during this investigation public information? What if there is a pending Internal Affairs investigation? How will the Board protect the peace officer personnel information?

Finally, under subdivision (b) the EO is supposed to issue findings based on this investigation. However, there is no provision for the "respondents" to respond in writing, setting forth their opposition to the complaint, as is contained in the current process.

Section 56.4: Cases Referred to Informal Hearing Before an ALJ

Subsection (a) provides the notice requirements for an informal hearing. However, as configured, certain problems are going to arise. For instance,

pursuant to subdivision (a) (2) each named respondent is supposed to provide a written response at least 10 days before the hearing under penalty of perjury. An easy question is whether the 10 day requirement is calendar days or working days since the regulations use both. In this department, working days for some staff include the weekends, so there is also the possibility that "business" days are meant (i.e., Monday through Friday). What happens if an employee is on vacation when the hearing notice is served? There is no provision to give more time under those circumstances. The regulations only speak to the complainant waiving time. Is the written response supposed to include any attachments? If the hiring agency is representing the employee, does the legal representative have to sign the response under penalty of perjury? Will the complainant get an opportunity to file a reply brief as current procedures allow? There is the potential of having to take adverse action at a later date, which creates the conflicts with the department attorneys representing the employees at this stage. Finally, where will these hearing be held? Will they be held at the Board's main offices or at the institutions like all other Board hearings?

The processes outlined in subsections (b) and (c) appear to be "formal hearing" processes, but there are several questions left unanswered: Subsection (b) sets forth some of the procedures the ALJ must adhere to during the informal hearing. However, it appears to be silent on the question of whether the parties will have an opportunity to cross-examine the witnesses. It also appears to be silent on the question of whether the witnesses will be sworn in. This subdivision also states that the ALJ can visit state facilities if necessary. Thus, if the informal hearing must be adjourned so the ALJ can visit a state facility how is the 60 working day time factored in? This subsection states, "the informal hearing and any supplemental proceedings shall be recorded by the" ALJ. Is that "tape-recording"? Some, if not all, of the ALJs use laptop computers. Technically, taking notes on their laptops is "recording."

Subsection (d) allows for the EO to accept, modify or reject the ALJ's decision and either issue his/her own findings or refer the matter back to the ALJ for further proceedings. There are no criteria set forth to modify or reject a decision. In addition, since the EO is not a constitutional officer, isn't it a denial of due process for there to be no recourse for the parties to appeal if they disagree with the EO's decision?

Section 56.5: Findings of the Executive Officer

Subsection (a) provides that the EO has 60 working days to issue his Notice of Findings (NOF) unless the time period is otherwise tolled or waived. What does this mean? For instance, who gets to waive the requisite time period, the complainant or the respondent or both?

Subsection (b) essentially says that if the EO comes back with a NOF dismissing the complaint, the complainant get a notification letter that s/he has exhausted his/her administrative remedy and is now free to go on to state court. It does not appear that a negative finding by the EO will have any preclusive effect if the complainant decides to go on to superior court. Thus, there is no incentive for the complaining party to fully litigate these proceedings, as s/he can go on to civil court where the recovery is larger.

Subsection (c) really raises the conflict flags between the hiring authority and its employees. In order for the EO to conclude that a complaint allegation was proven by a preponderance of the evidence, there must have been an evidentiary hearing. If the EO finds for the complainant then the NOF must set forth both the legal causes for discipline under Section 19572 of the Government Code and the level of discipline the hiring authority must impose on the individual found to have engaged in retaliatory conduct. Who is going to take the required discipline if the hiring authority defended the respondent employee(s)? Clearly, if the employee is being defended by the hiring authority a decision must have been made that this particular employee did nothing wrong. A second issue is the respondents' appeal rights: There is no indication where the hiring authority or the involved employee get to go if they disagree with the NOF. A third issue is whether this matter constitutes a "hearing" for disciplinary purposes and meets the requirements under Skelly. Thus, if the employee gets a second "disciplinary" hearing, what happens if there are inconsistent outcomes?

Subsection (d) gives the respondents the right to request a hearing if they disagree with the NOF. Thus, some of the questions addressed as to subsection (c) also apply here. A major conflict exists with the Board passing on discipline recommended by the EO since the Board always opines that it is that entities role to determine what is a just and proper penalty. Further, there is no "right" to a hearing, since the Board has the discretion to order an evidentiary hearing before the Board itself or an ALJ. If another hearing is held that could be the 3rd or 4th one that will take place in one action; i.e. there is the investigative hearing before the staff member, the informal hearing before an ALJ, the formal one before the ALJ and this one.

Section 56.6: Disciplinary Action for Proven Retaliatory Acts

Subsection (a) merely sets forth what will happen if the Board issues a final decision against a manager, supervisor, or other state civil service employee who has engaged in improper retaliatory acts. The concerns raised in Sections 56.4(b) and 56.5(c) are applicable here.

Subsection (c) provides that if a final decision is issued by the Board then

the individual against whom the disciplinary action was taken has no further right to appeal to the Board beyond submitting a petition for re-hearing. The regulations are silent on whether the employee in question has the right to take a writ, but this would be governed by Section 1094.5 of the California Code of Civil Procedure.

The rights of the respondents are never really addressed in any detail. If the complainant only filed against the hiring authority, how do we get to the question of discipline against a particular employee? What recourse does a respondent employee have against a complainant, if the matter is dismissed at the NOF stage? Does the respondent employee have the right to submit a Request to File Charges if s/he feels the complaint was without merit?

Who will be monitoring the time frames in this section? What is the consequence of missing these time frames?

Section 56.7: Consolidation with other Hearings

Subsection (a) raises the element of damages in whistleblower retaliation complaints. What standard will the Board be using if, or when, it awards damages?

Subsection (b) is vague. What are the criteria for the ALJ making these orders?

Section 56.8: Evidentiary hearing Procedures and Representation by the Executive Officer

Subsection (b) appears to answer the question raised above regarding who is going to handle the hearing after the NOF is issued. Unless the parties consent, the ALJ who did the informal/formal hearing during the NOF phase cannot do the second hearing.

Subsection (d) is the provision that gives the EO the authority to take on selected whistleblower retaliation complaints. The Board can anticipate department attorneys making an objection to the EO prosecuting the case, if the EO has worn the hat of all the other roles in the same case. Subdivision (d)(2) states that if the EO, or his designee, does conduct the hearing then it will be done before an ALJ from the Office of Administrative

Hearings. Ultimately the case will have to go back to the Board for a thumbs up/down on the ALJ's decision. Thus, the conflict is still there; that is, there is the impression of a conflict of interest when the Board is being asked to pass on the litigation skill of its own EO/staff.

In closing, the Office of Legal Affairs (OLA) for the Department of Corrections and Rehabilitation does appreciate the Board's efforts to streamline the process in Whistleblower actions and provide a more comprehensive review of the evidence. We continue to be concerned about the short time frames; but understand that those time frames are statutorily driven and cannot be changed through regulation. We should discuss the process for giving notice to the named employees. In the past, for Requests to File Charges, the documents have been sent to the OLA for distribution to the institutions and ultimately to the employees. That is a cumbersome process that eats up valuable response time. It is not something that needs to be included in the regulations, but it needs to be coordinated between the OLA and the Board.

Please let me know if you need any clarification of the above comments and I will obtain those clarifications for you.

Debra L. Ashbrook

Assistant Chief Counsel

Employment Advocacy & Prosecution Team

Telephone: 916-322-4839

Cell phone: 916-712-6686

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STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR - LEGAL UNIT
2424 Arden Way, Suite 130
Sacramento, CA 95825-2400



Tel: (916) 263-2880
Fax: (916) 263-2887

Cabinet 8/435-2880
Cabinet 8/435-2887

TO FILE: THIS FAX COVER SHEET WAS USED TO SUBMIT COMMENTS TO
THE PROPOSED AMENDMENTS TO REGULATIONS CONCERNING
WHISTLEBLOWER COMPLAINT RETALIATIONS AND DISCOVERY
IN EVIDENTIARY HEARINGS AND ACCOUNTS FOR THE 21 PAGE TRANSMITTAL.

PERSONAL AND CONFIDENTIAL**FACSIMILE TRANSMISSION COVER SHEET**FAX NUMBER SENDING FROM: (916) 263-2887

FAX NUMBER SENDING TO: (916) 653-4256

**I AM TRANSMITTING 21 PAGES, INCLUDING THIS COVER SHEET.
IF THE TRANSMISSION IS INCOMPLETE, PLEASE CALL (916) 263-2880.**

TO: Bruce Monfross

FROM: Frank Nelson AdkinsDATE: August 22, 2005

RE:

MESSAGE: Per our discussion—comments on proposed regulations. I am sending only that portion of the text to which comments were made.

THANK YOU.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender, immediately, by telephone, and return the original message to the sender at the above address via the U.S. Postal Service.

**NOTICE OF PROPOSED REVISION OF REGULATIONS
AND STATEMENT OF REASONS
California Code of Regulations**

Title 2, Administration

Division 1, Administrative Personnel

Chapter 1, State Personnel Board

Article 4, Hearings and Appeals

Effective July 3, 2005

**FOR ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND
MEMBERS OF THE GOVERNOR'S CABINET**

**SUBJECT: PROPOSED AMENDMENTS TO REGULATIONS CONCERNING
DISCREPANCY RETALIATION COMPLAINT PROCEDURES**

PURPOSE:

Modern authority established in Government Code (GC) § 18701, the State Personnel Board (SPB), proposes to amend Title 2 of the California Code of Regulations (CCR) §§ 56 through 56.8, which provide procedures for discrepancy retaliation complaints.

REFERENCE:

These regulations are amended to implement, interpret, and/or make specific GC §§ 8547.8 and 19683.

PUBLIC HEARING:

Date and Time: August 30, 2005 from 9:30 to 10:00 a.m.

Place: The Westin Los Angeles Airport Hotel

Midway Room

5400 West Century Boulevard

Los Angeles, CA 90045

Purpose: To receive written or oral comments about this action.

WRITTEN PUBLIC COMMENT PERIOD:

The written public comment period will close Monday, August 22, 2005, at 5:00 p.m. This comment period allows time for SPB staff to provide copies of any written comments to the five-member State Personnel Board (Board) for their consideration at the time of the hearing. Any person may submit written

Comments about the proposed amendments. To be considered by the Board, the proposed person identified below must receive written comments before the close of the public comment period. Written comments may be submitted to Bruce Monfross at SPB, P.O. Box 944201, Sacramento, CA 95824-2010, or to bruce.monfross@spb.ca.gov, or faxed to his attention at (916) 653-4256. In addition, after the August 30, 2005 hearing, SPB staff will review the testimony as well as the written and verbal comments and revise the proposed regulations as necessary. An additional time for public comment will be set aside during the October 4-5, 2005 meeting in Sacramento for those interested parties who are unable to attend the August 30, 2005 meeting in Los Angeles, or who have additional comments regarding any proposed revisions to the regulations.

AVAILABILITY OF PROPOSED TEXT AND STATEMENT OF REASONS/CONTACT PERSONS:

Copies of the express terms of the proposed action, the Statement of Reasons, and all of the information upon which this proposal is based are available upon request to Elizabeth Montoya. The rulemaking file is available for review during normal business hours at SPB, 801 Capitol Mall, Sacramento, CA 95814. Additional information or questions regarding the substance of the proposed action should be directed to Bruce Monfross as specified above. Questions regarding the regulatory process in conjunction with this regulation should be directed to Elizabeth Montoya at SPB, P.O. Box 944201, Sacramento, CA 95824-2010, or by telephone at (916) 654-0842 or TDD (916) 653-1498.

AVAILABILITY OF CHANGES TO PROPOSED TEXT:

If any substantial and sufficiently related changes are made to the text as a result of comments received during the public comment period, SPB will make the full text of the changed regulation(s) available for at least 15 days before the date the regulations is permanently amended.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW:

GC § 8547.8 authorizes state employees or applicants for state employment to file a complaint with SPB if the employee or applicant believes that he/she has been retaliated against in employment for having engaged in whistleblowing activities. GC § 18701 authorizes the Board to prescribe, amend, and repeal regulations for the administration and enforcement of the Civil Service Act (GC §§ 18500 et seq.). GC § 18214 provides that certain subject regulations adopted by SPB are exempt from specific procedures required by the Administrative Procedure Act (Chapter 3.5, commencing with GC § 11340 of Part of Division 3). GC § 19683 authorizes SPB to investigate and conduct hearings concerning complaints of whistleblower retaliation filed by state employees or applicants for state employment. Under existing regulations, any Notice of Findings issued by the Executive Officer regarding whistleblower retaliation complaints filed with

SPB is based almost exclusively upon a review of written briefs and documentary evidence submitted by the parties. The proposed revised regulations will grant the Executive Officer the discretion to schedule any whistleblower retaliation complaint accepted by SPB for either an informal hearing before an administrative law judge (ALJ), or an investigation conducted by SPB staff. The assigned ALJ or SPB investigator(s) will have the authority to, among other things, subpoena records and other evidence and to question witnesses prior to submitting their findings and recommendations to the Executive Officer. When the Executive Officer will issue a Notice of Findings. The assigned ALJ will also have the authority to convert the informal hearing to a formal evidentiary hearing if the circumstances warrant such action. In those cases where the Executive Officer concludes, based on the information presented, that no retaliation has been proven, the Notice of Findings will inform the complaining party that he or she has exhausted his or her administrative remedies, and can seek judicial relief pursuant to the provisions of GC § 8547.8(c). In those cases where the Executive Officer concludes that retaliation has been proven, those persons and/or entities found to have engaged in retaliatory acts will be apprised of their right to request a formal hearing regarding the findings of the Executive Officer. The Executive Officer shall have the discretion to prosecute any whistleblower retaliation complaint scheduled for a formal hearing before either an ALJ or the Board, but the complaining party shall also be entitled to be represented by a legal representative of his or her own choosing during that hearing.

Comment: Proposed regulations provide no criteria upon which discretionary decision should be based. SPB should give guidance to its ALJs and inform parties when conversion might be warranted and to provide ability to conduct discovery once converted to a formal evidentiary hearing.

IMPACT ON SMALL BUSINESSES:

No impact on small businesses is anticipated from the implementation of the proposed amendment. Implementing the proposed amendment will affect only state departments and current and prospective employees of state departments.

LOCAL MANDATE:

SPB has determined that the proposed action imposes no mandate upon local agencies or school districts and therefore requires no reimbursement pursuant to G.C. § 17561.

COST ESTIMATES OF PROPOSED ACTION:

Costs or Savings to State Agencies:

The proposed regulations will involve no additional costs or savings to any state agency.

Impact on Housing Costs:

- (b) The complaint shall be filed with the Appeals Division within one year of the most recent alleged act of reprisal. The complaining party shall submit an original complaint and copy of all attachments, and enough copies of the complaint and all attachments for the Appeals Division to serve each entity and person alleged to have engaged in retaliatory conduct and against whom damages and/or disciplinary action is sought.

- (c) All complaints shall be in writing.

(1) Each complaint shall:

- (i) identify the facts that form the basis of the complaint, including, but not limited to: the improper governmental activity that the complainant reported, or the illegal order or directive the complainant refused to obey; the date the complainant reported the improper governmental activity, or refused to obey the illegal order or directive; the person(s) to whom the complainant reported the improper governmental activity, or to whom the complainant stated that he or she would not obey the illegal order or directive; the improper personnel action, as defined in Government Code Section 8547.3(b), or Education Code Section 87163(b), the complainant experienced as a result of reporting the improper governmental activity, or refusing to obey an illegal order or directive; the date on which the improper employment action occurred; and all information that the complainant possesses that shows that the improper employment action occurred as a result of complainant's report of improper governmental activity, or refusal to obey the illegal order or directive;

- (A) For purposes of this section, "improper personnel action" includes, but is not limited to, promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance

Comment: Should "Appeals Division" be changed to "Board"?

Comment: Add "Complainant shall simultaneously serve each respondent with the complaint and attachments. Otherwise, give the short response notice to a bill of respondents to investigate and to formulate a finding of response on the bill of respondents."

Section 19253.5, when appealing a notice of non-punitive action pursuant to Government Code Section 19585, or when appealing a notice of career executive assignment termination pursuant to Government Code Section 19889.2. Neither the remedies nor the relief available to a complaining party pursuant to the provisions of Government Code Sections 8547.8 or 19683, shall, however, be available to a party who raises whistleblower retaliation as either an affirmative defense or as a separate cause of action in any other Board hearing, unless that party has first complied with all filing requirements set forth in Section 56.1.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.3, 8547.8, 18670, 18671, 18675, 19175, 19253.5, 19572, 19583.5, 19585, 19683 and 19889.2; and Section 6229, Penal Code.

56.2. Acceptance of Whistleblower Complaint; Notice; Findings of the Executive Officer.

(a) Within 10 working days of receipt of the complaint, the Appeals Division Board shall initiate an investigation to determine if whether the Board it has jurisdiction over the complaint and to determine if whether the complainant meets the filing requirements set forth in Section 56.1. The Appeals Division Board shall also determine if whether the complainant has complied with all other requirements for filing a retaliation complaint, as set forth in Government Code Sections 8547-8547.12 and 19683 and/or Education Code Sections 87160-87164; and Section 56.1 of these regulations.

(b) If the Appeals Division Board determines that all filing requirements have not been satisfied the complaint does not meet all filing requirements, it shall notify the complaining party in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party shall may thereafter be permitted to file an amended complaint within 15-10 working days of receipt service of the notice of non-acceptance of the complaint.

(c) Within 10 working days of receipt of the amended complaint, the Appeals Division shall initiate an investigation to determine if the Board has jurisdiction over the amended complaint, and to determine if the amended complaint meets the filing requirements set forth in Section 56.1. For purposes of determining the one year limitation period, the date that the original complaint is filed with the Board shall be deemed the filing date for the amended complaint. If the Appeals Division determines that all filing requirements have not been satisfied, it shall notify the complaining party in writing that the amended complaint has been rejected and the reason(s) for that determination.

Comments Add: "The Board shall notify the complainant and each respondent of its determination within 10 working days of its receipt of the complaint."

Comments Add "and each respondent"

Comments Add "The amended complaint, if any, shall be simultaneously served on the Board and each respondent."

activities, the Executive Officer may, in his or her sole discretion, assign the case to an evidentiary hearing before a Board Administrative Law Judge.

(c) The Notice of Findings shall inform each named party of his or her respective right to file a Petition for Hearing Before the Board, pursuant to the provisions of Section 56.3 and/or 56.4. However, in those cases where the Executive Officer issues a Notice of Findings assigning the matter to an evidentiary hearing pursuant to the provisions of subdivision (b), no party to the complaint shall be entitled to file either a Petition for Hearing before the Board, nor a Petition for Order of Remedies.

If a response is extended by the complaining party in writing, the Executive Officer shall, within 10 working days of receipt of the complaint or response, notify the complaining party of a decision to either:

Comment: Add and enclose respondent.

- (1) dismiss the complaint for failure to meet jurisdictional or filing requirements; or
- (2) refer the case for investigation and/or an investigative hearing in accordance with the provisions of Section 56.3; or
- (3) schedule the case for an informal hearing before an administrative law judge, in accordance with the provisions of Section 56.3.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Sections 87160-87164, Education Code; Sections 8547-8547.2, 8547.3, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

§ 56.3. Petition for Hearing by Complainant Before the Board: Cases Referred to Investigation or Investigative Hearing.

(a) If the Notice of Findings concludes no retaliation occurred, the complainant may file a Petition for Hearing before the Board.

(b) A Petition for Hearing under this section must be filed with the Executive Officer and served on each named respondent(s) to the complaint not in 30 days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with a proof of service attached, to the business address of each named party to the complaint.

(c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to those allegations, issues,

- (a) If the Executive Officer assigns a complaint for investigation or an investigative hearing, the Executive Officer or the assigned investigator(s) shall conduct the investigation and/or investigative hearing in the manner and to the degree they deem appropriate, and shall have full authority to question witnesses, inspect documents, and visit state facilities in furtherance of their investigations. All state agencies and employees shall cooperate fully with the investigators, or be subject to disciplinary action for impeding the investigation. The investigators shall have authority to take depositions, issue subpoenas, order the production of documents, and take any other action to ensure a fair and expeditious investigation and/or investigative hearing. The 60 working day period governing the issuance of the Notice of Findings set forth in Section 56.5(a) shall be tolled for any period of non-compliance by any party to the investigation or investigative hearing.
- (b) The Executive Officer shall issue findings regarding the allegations contained in the complaint and a recommended remedy, if any, based on the investigation or investigative hearing, in accordance with the provisions of Section 56.5.

Comments: It is unclear whether an "investigative hearing" is as compared to what an ALJ conducts as an informal hearing. Will these investigative hearings be subject to any due process guidelines or procedural guidelines?

Comments: Specific cause provided by Govt. Code 54957.2 should be stated.

Comments: The activity specifically described herein constitutes the practice of law which non-ALJ investigators may not be licensed to do. Provision that investigators may "take any other action to ensure a fair and expeditious investigation and/or investigative hearing" is overbroad and vague. It cannot be determined what "any other action" might encompass. What is the authority by which investigators issue subpoenas as a judicial act?

NOTE: Authority cited: Sections 18701 and 18214, Government Code; Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18673, 18682, 19583.5 and 19683, Government Code; and Section 6129, Penal Code.

56.5. Petition for Hearing by Respondents Before the Board: Cases Referred to Informal Hearing Before an ALJ.

- (a) Any named respondent found in the Notice of Findings to have engaged in retaliatory conduct may file a Petition for Hearing before the Board, contesting the findings of fact and conclusions regarding the legal causes for discipline and/or the penalty to be imposed.
- (b) A Petition for Hearing must be filed with the Executive Officer and served on each named party to the initial complaint within 30 days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with proof of service attached, to the home or business address of each named party to the complaint.
- (c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to these allegations, issues,

adverse action taken as a result of that Decision shall not have any right of review or appeal to the Board concerning that action, with the exception of a hearing on rehearing.

(3) For those complaints assigned to an informal hearing before an administrative law judge, the Board shall serve notice of the informal hearing on all parties to the complaint a minimum of 30 days prior to the scheduled hearing date. Service on each respondent shall be made at the respondent's business address. The notice shall:

- (1) include a complete copy of the complaint with all attachments, and a copy of the statutes and rules governing the informal hearing; and
- (2) require each named respondent to serve on the complainant and file with the Board, at least 10 days prior to the informal hearing, a written response to the complaint, signed under penalty of perjury, specifically addressing the allegations contained in the complaint.

(4) The informal hearing shall be conducted in conformance with those procedures set forth in Government Code Section 11445.10 et seq., and may, in the discretion of the administrative law judge, include such supplemental proceedings, informal or formal, as ordered by the administrative law judge to ensure that the case is heard in a fair and expeditious manner. The administrative law judge shall have full authority to question witnesses, inspect documents, visit state facilities in furtherance of the hearing, and otherwise conduct the hearing in the manner and to the degree he or she deems appropriate. The informal hearing and any supplemental proceedings shall be recorded by the administrative law judge.

(5) Following the informal hearing and any supplemental proceedings, the administrative law judge shall issue findings for consideration by the Executive Officer regarding the allegations contained in the complaint, together with all recommended relief, if any, proposed to remedy any retaliatory conduct.

(6) The Executive Officer shall have the discretion to adopt the administrative law judge's findings and recommended remedies in their entirety; modify the administrative law judge's findings and recommended remedies; or reject the administrative law judge's findings and recommended remedies, and:

- (1) issue independent findings after reviewing the complete record; or

Comment: The reality is that 20 days for an agency to investigate and prepare a response to be signed under penalty of perjury by a respondent is unrealistic.

Comment: Add: "unprivileged and unprotected"

Comment: Add: "that does not deny due process to any party"

Comment: Add: "All parties, upon request, shall be provided with a copy of the recording of the informal hearing."

Comment: Add: "and simultaneously serve on all parties"

Comment: Does this include the issuance of an adverse action? Proposing a remedy when there has only been an informal hearing deprives the individual respondents of due process and the right to a pre-deprivation hearing under Skelly.

- (2) remand the case back to the administrative law judge for further proceedings.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 11445.10 et seq., 18583, 18670, 18671, 18672, 18675, 19572, 19574, 19575, 19582, 19590, 19592 and 19593, Government Code; and Section 6129, and Penal Code.

§ 50.5 Decision Adopting the Notice of Findings: Findings of the Executive Officer

After a hearing is received pursuant to the provisions of Section 8547.8(c), the Notice of Findings shall be deemed to be the Board's final decision in the matter, and no named party to the action shall be deemed to have any right of further appeal to the Board.

After the Executive Officer shall issue a Notice of Findings within 60 working days after the Board accepts the complaint unless the complaining party agrees in writing, to extend the period for issuing the findings, or unless the time period is otherwise tolled or waived.

(a) In those cases where the Executive Officer concludes that the allegations of retaliation were not proven by a preponderance of the evidence, the Executive Officer shall issue a Notice of Findings dismissing the complaint. The Notice of Findings shall notify the complainant that his or her administrative remedies have been exhausted and that the complainant is free to file a civil complaint with the superior court pursuant to Government Code Section 8647.8(c).

(b) In those cases where the Executive Officer concludes that the complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named respondents deemed to have engaged in retaliatory acts toward the complainant. If the Notice of Findings concludes that any individual manager, supervisor, or other employee engaged in improper retaliatory acts, the Notice of Findings shall include the legal causes for disciplinary action under Government Code Section 19572 and the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct.

(c) The Notice of Findings shall inform any respondent found to have engaged in retaliatory acts of his or her right to request a hearing regarding the Notice of Findings. Any such request shall be filed with the Board and served on all other parties within 30 days of the issuance of the Notice of Findings. Upon receipt of a timely request for hearing, the Board shall, at its discretion, schedule a hearing before the five-member Board, or an evidentiary hearing before an

Comment: The term "accepts the complaint" needs definition: Is this the date upon which the Board determines the complaint meets requirements provided by §56.2(a) or (b), or is it the date upon which the Board notifies the complainant (and should also notify each respondent) pursuant to proposed regulation §56.2(c) of its action on the complaint or amended complaint.

Comment: Change "free to file" to "may".

Comment: This usurps the appointing powers prerogative to determine level and type of discipline.

Comment: What about pre-deprivation rights? The findings seem to issue after an informal, non-evidentiary and non-judicial process. This is really just an investigative report. The full Board should issue a proposed Notice of Findings after a review of the report with the time to file an appeal measured from that issuance.

advisative law judge, regarding the findings of the Executive Officer. If a timely request for hearing is not filed with the Board, the Notice of Findings shall be deemed to be the Board's final decision in the case.

NOTE: Authority cited: Sections 18701 and 18214, Government Code; Reference: Section 87164, Education Code; Sections 65473, 18670, 18671.1, 18675, 18672, 19574, 19575, and 19582, 19590 and 19683, Government Code; and Section 8129, Penal Code.

Section 56.5(c) Disciplinary Action for Proven Retaliatory Acts

(a) In those cases where the Board issues a final Decision that finds that any employer, supervisor, or other state civil service employee has engaged in improper retaliatory acts, the Board shall order the appointing authority to place a copy of the Board's Decision in that individual's Official Personnel File. The Decision shall set forth the legal causes for discipline under Section 19572, and the amount of the penalty imposed on the individual. The appointing authority shall place the Decision in the individual's Official Personnel File within 30 days of the issuance of the Board's Order and shall also, within that same period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 days of the issuance of the Board's Order, notify the Board that it has complied with the provisions of this subdivision.

(b) In those cases where the Board issues a final Decision that finds that any community college administrator, supervisor, or public school employer, has engaged in improper retaliatory acts, the Board shall order the appointing authority to place a copy of the Board's Decision in that individual's official personnel record. The appointing authority shall place the Decision in the individual's Official Personnel File within 30 days of the issuance of the Board's Order and shall also, within 40 days of the issuance of the Board's Order, notify the Board that it has complied with the provisions of this subdivision.

(c) Any Decision, as described in subdivision (a) or (b), shall be deemed a final decision of the Board and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

(d) For purposes of this Section, the Board's decision is deemed to be final after:

- (1) a request for hearing pursuant to Section 56.5(c) has not been timely filed with the Board; or
- (2) 30 days has elapsed from the date that the five-member Board has issued a decision adopting or modifying the

Comment: Subsection "c" should be changed to subsection "d".

proposed decision submitted by an administrative law judge after an evidentiary hearing and a Petition for Rehearing concerning that decision has not been filed with the Board, or

(3) a decision has been issued by the five-member Board after a hearing before that body and no Petition for Rehearing concerning that decision has been filed with the Board.

Notwithstanding Sections 18701 and 18714, Government Code; Sections 87164, Education Code; Sections 6547.8, 18670, 18671, 18675, 18710, 19572, 19574, 19582, 19583.5, 19590, 19592, and 19683, Government Code, and Section 6129, Penal Code.

(566) Consolidation with Other Hearings

In those cases where an appeal from adverse action, rejection during probationary period, medical action, or non-punitive action is consolidated with a whistleblower retaliation complaint, and the whistleblower retaliation complaint involves specifically named individuals against whom damages or adverse action is sought pursuant to the provisions of Section 56.1(a)(7) (d) and (e), each individually named respondent shall have the right to participate in the consolidated hearing in such a manner as to reasonably defend him or herself against the allegations contained in the whistleblower retaliation complaint. These rights shall include, but not be limited to:

- (1) to be represented by a representative of his or her own choosing during the consolidated hearing;
- (2) to present a defense on his or her own behalf concerning the allegations and issues raised in the whistleblower retaliation complaint, separate and apart from any defense presented by the appointing power or any other named respondent;
- (3) to conduct pre-hearing discovery concerning allegations and issues raised in the whistleblower retaliation complaint;
- (4) to examine and cross examine witnesses concerning allegations and issues raised in the whistleblower retaliation complaint;
- (5) to introduce and challenge the introduction of evidence concerning allegations and issues raised in the whistleblower retaliation complaint; and

Comments: This doesn't provide for a procedural mechanism to request for consolidation. This just provides for a right to discovery, but doesn't require the ALJ to provide for a consolidated hearing to allow all parties to develop and discovery, not less than the time provided under the discovery regulations.

(Cal. 10/03/05;)

TO: STATE PERSONNEL BOARD

FROM: BRUCE MONFROSS
Chief Counsel's Office

REVIEWED BY: ELISE ROSE
Chief Counsel

SUBJECT: SECOND PUBLIC HEARING ON PROPOSED REVISIONS TO
DISCOVERY IN EVIDENTIARY HEARING REGULATIONS
(TITLE 2, CALIFORNIA CODE OF REGULATIONS, §§ 57
ET SEQ.)

REASON FOR HEARING AND DISCUSSION:

State Personnel Board (SPB) staff is proposing to amend Title 2 of the California Code of Regulations, §§ 57 through 57.4, which provide procedures for conducting discovery in evidentiary hearings before the five-member State Personnel Board or its designated representative. The initial hearing on this matter was held in Los Angeles on August 30, 2005.

In addition, to encourage and solicit comments either in writing or verbally, these proposed amendments were made available to departments and other interested parties for a 45-day comment period, which ended August 22, 2005. This hearing is being held to provide opportunity for statements from those interested parties who were unable to attend the initial hearing.

The original Notice of Proposed Revision of Regulations and Statement of Reasons dated July 8, 2005 from the initial hearing are attached for the convenience of the members of the Board and the public. The full text and a discussion of the proposed amendments to these regulations are contained in these documents. Also attached are copies of the comment received by August 22, 2005.

SPB staff will give full consideration to the testimony received at each hearing along with the written comments received, and revise the proposed regulations as necessary.

Attachment: NOTICE OF PROPOSED REVISION OF REGULATIONS AND
STATEMENT OF REASONS DATED JULY 8, 2005



**NOTICE OF PROPOSED REVISION OF REGULATIONS
AND STATEMENT OF REASONS**

**California Code of Regulations
Title 2. Administration
Division 1. Administrative Personnel
Chapter 1. State Personnel Board
Article 4. Hearings and Appeals**

DATE: July 8, 2005

TO: ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND MEMBERS
OF THE GOVERNOR'S CABINET

SUBJECT: PROPOSED AMENDMENTS TO REGULATIONS CONCERNING
DISCOVERY IN NON-ADVERSE ACTION EVIDENTIARY HEARINGS

AUTHORITY:

Under authority established in Government Code (GC) § 18701, the State Personnel Board (SPB) proposes to amend Title 2 of the California Code of Regulations (2CCR) §§ 57.1 through 57.4 which provide procedures for conducting discovery in non-adverse action evidentiary hearings before the five-member State Personnel Board (Board) or its designated representative. These discovery provisions apply to appeals relating to discrimination, denial of reasonable accommodation, and whistleblower retaliation complaints.

REFERENCE:

These regulations are amended to implement, interpret, and/or make specific GC §§ 8547.8, 19683, and 19700-19706.

PUBLIC HEARING:

Date and Time: August 30, 2005 from 10:00 to 10:30 a.m.

Place: The Westin Los Angeles Airport Hotel
Midway Room
5400 West Century Boulevard
Los Angeles, CA 90045

Purpose: To receive written or oral comments about this action.

WRITTEN PUBLIC COMMENT PERIOD:

The written public comment period will close Monday, August 22, 2005, at 5:00 p.m. This comment period allows time for SPB staff to provide copies of any written comments for

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in Non-Adverse Action Evidentiary Hearings
July 8, 2005
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the Board's consideration at the time of the hearing. Any person may submit written comments about the proposed amendments. To be considered by the Board, the appropriate person identified below must receive written comments before the close of the public comment period.

Written comments may be submitted to Bruce Monfross at SPB, P.O. Box 944201, Sacramento, CA 94244-2010, or to bmonfross@spb.ca.gov, or faxed to his attention at (916) 653-4256.

In addition, after the August 30, 2005 hearing, SPB staff will review the testimony as well as the written and verbal comments and revise the proposed regulations as necessary. An additional time for public comment will be set aside during the October 4-5, 2005 meeting in Sacramento for those interested parties who are unable to attend the August 30, 2005 meeting in Los Angeles, or who have additional comments regarding any proposed revisions to the regulations.

AVAILABILITY OF PROPOSED TEXT AND STATEMENT OF REASONS/CONTACT PERSONS:

Copies of the express terms of the proposed action, the Statement of Reasons, and all of the information upon which this proposal is based, are available upon request to Elizabeth Montoya. The rulemaking file is available for review during normal business hours at SPB, 801 Capitol Mall, Sacramento, CA 95814. Additional information or questions regarding the substance of the proposed action should be directed to Bruce Monfross as specified above. Questions regarding the regulatory process in conjunction with this regulation should be directed to Elizabeth Montoya at SPB, P.O. Box 944201, Sacramento, CA 94244-2010, or by telephone at (916) 654-0842 or TDD (916) 653-1498.

AVAILABILITY OF CHANGES TO PROPOSED TEXT:

If any substantial and sufficiently related changes are made to the text as a result of comments received during the public comment period, SPB will make the full text of the changed regulation(s) available for at least 15 days before the date the regulation(s) is permanently amended.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW:

GC § 8547.8 authorizes state employees or applicants for state employment to file a complaint with SPB if the employee or applicant believes that he/she has been retaliated against in employment for having engaged in whistleblowing activities.

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GC § 18701 authorizes the Board to prescribe, amend, and repeal regulations for the administration and enforcement of the Civil Service Act (GC §§ 18500 *et seq.*).

GC § 18214 provides that certain subject regulations adopted by SPB are exempt from specific procedures required by the Administrative Procedure Act (Chapter 3.5, commencing with GC § 11340 of Part of Division 3).

GC § 19683 authorizes SPB to investigate and conduct hearings concerning complaints of whistleblower retaliation filed by state employees or applicants for state employment.

GC §§ 19700-19706 authorizes SPB to investigate and conduct hearings concerning discrimination complaints filed by state employees or applicants for state employment who believe they have been discriminated against on the basis of age, blindness or color blindness, sex, race, religious creed, color, national origin, ancestry, marital status, physical disability, mental disability, or sexual orientation.

The proposed revisions clarify that the discovery regulations will apply to cases scheduled for a formal evidentiary hearing before an SPB administrative law judge (ALJ) in the following circumstances:

- When discrimination or retaliation is raised as an affirmative defense during the course of an appeal from disciplinary action (GC §§ 19574 and 19590).
- When an appeal from rejection during probationary period (GC § 19173), medical action (GC § 19253.5), non-punitive action (GC § 19585), denial of reasonable accommodation (GC § 19702), Career Executive Assignment termination (GC § 19889.2), or constructive medical termination is filed with SPB.
- When a complaint of discrimination (GC § 19702), or whistleblower retaliation (Education Code § 87164; GC §§ 8547.8 and 19683) is scheduled for a formal evidentiary hearing.

The proposed revisions also clarify that the discovery regulations will not apply to any other hearing, either formal or informal, conducted by SPB staff. All other revisions are of a technical or clarifying nature.

IMPACT ON SMALL BUSINESSES:

No impact on small businesses is anticipated from the implementation of the proposed amendment. Implementing the proposed amendment will affect only state departments and current and prospective employees of state departments.

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LOCAL MANDATE:

SPB has determined that the proposed action imposes no mandate upon local agencies or school districts and therefore requires no reimbursement pursuant to G.C. § 17561.

COST ESTIMATES OF PROPOSED ACTION:

Costs or Savings to State Agencies:

The proposed regulations will involve no additional costs or savings to any state agency.

Impact on Housing Costs:

The proposal will not affect housing costs.

Costs or Savings in Federal Funding to the State:

No impact.

Costs or Savings to Local Agencies or School Districts Required to be Reimbursed:

No costs to local agencies or school districts are required to be reimbursed.

Other Nondiscretionary Costs or Savings Imposed on Local Agencies:

This proposal does not impose nondiscretionary costs or savings on local agencies.

Cost Impact on Representative Private Persons or Businesses:

SPB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

ASSESSMENT OF POTENTIAL ADVERSE ECONOMIC IMPACT ON BUSINESS:

SPB has made an initial determination that the proposed action will have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

ASSESSMENT REGARDING THE EFFECT ON JOBS/BUSINESSES:

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination, creation, or expansion of existing businesses or create or expand businesses in the State of California.

ALTERNATIVES STATEMENT:

SPB must determine that no reasonable alternative considered by SPB, or that has otherwise been identified and brought to the attention of SPB, would be more effective in carrying out the purpose for which this action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

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FINAL STATEMENT OF REASONS:

It is anticipated that the proposed regulations will be filed with Office of Administrative Law pursuant to GC § 18214, under which no Final Statement of Reasons is required. However, if a Final Statement of Reason is prepared, copies may be obtained from the contact person or backup contact person when it becomes available.

ACCESSING INFORMATION REGARDING THIS RULEMAKING FILE ON THE STATE PERSONNEL BOARD WEBSITE:

The text of the proposed amendments, the Notice of Proposed Amendment of Regulations and Statement of Reasons, and if prepared and when available for review, the Final Statement of Reasons, will be on SPB website at: www.spb.ca.gov.

STATEMENT OF REASONS:

The proposed revisions are designed to clarify the extent to which discovery may be conducted in those cases scheduled for a formal evidentiary hearing before a SPB ALJ. Existing statutes and regulations do not specify the permissible scope of discovery for the following types of cases that are typically scheduled for formal evidentiary hearings before an ALJ: rejections during probationary period (GC § 19173); medical transfer/demotion/termination (GC § 19253.5); non-punitive transfer/demotion/termination (GC § 19585); career executive assignment termination (GC § 19889.2); and constructive medical termination. The proposed revised regulations make clear the discovery mechanisms that are available to the parties for such cases.

/s/Laura M. Aguilera

Laura M. Aguilera
Assistant Executive Officer

Attachment: Proposed Text of Amended Regulations

REGULATIONS GOVERNING DISCOVERY IN EVIDENTIARY HEARINGS

For this amendment, text added to the regulation is indicated by underline and text deleted from the regulation is indicated by ~~strikethrough~~.

TITLE 2. Administration DIVISION 1. Administrative Personnel CHAPTER 1. State Personnel Board SUBCHAPTER 1. General Civil Service Regulations ARTICLE 4. Hearings and Appeals

§ 57.1. Discovery in Evidentiary Hearings ~~Other than Adverse Actions;~~ ~~Exclusive Provisions Before the Board or a Board~~ Administrative Law Judge.

~~The provisions of Section 57.2 – 57.4 provide the exclusive right to and method of discovery for evidentiary hearings conducted before the Board and/or Board administrative law judges concerning appeals from discrimination (Sections 54 and 54.2), and when a petition for hearing is granted from the Notice of Findings issued in relation to a complaint of whistleblower retaliation (Sections 56– 56.8). These provisions shall also apply when discrimination or retaliation is raised as an affirmative defense in an answer or appeal filed with the Board pursuant to the provisions of Section 51.2 concerning Notices of Adverse Action (Government Code Sections 19575 and 19590), Rejections During Probationary Period (Government Code Section 19175), Medical Actions (Government Code Section 19253.5), and Non-Punitive Actions (Government Code Section 19585).~~

~~(a) An employee who is served with a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19574 or 19590 shall be entitled to conduct discovery in accordance with the provisions of Government Code Sections 19574.1 and 19574.2. In those cases where an employee raises an affirmative defense alleging discrimination or retaliation when filing an answer to a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19575 or 19590, or in those cases where an employee raises an affirmative defense of retaliation or discrimination during the course of a hearing before the Board or a Board administrative law judge regarding an appeal from adverse action, the appointing power or any other named respondent shall be entitled to conduct discovery regarding any such affirmative defense in accordance with the provisions of Sections 57.2 – 57.4.~~

(b) Any party to any other type of action scheduled for hearing before the Board and/or a Board administrative law judge, including but not limited to, rejections during probationary period (Government Code Section 19173), discrimination complaints (Government Code Section 19702), appeals from denial of reasonable accommodation (Government Code Section 19702), whistleblower retaliation complaints (Education Code Section 87164, Government Code Sections 8547.8 and 19683), appeals from non-punitive action (Government Code Section 19585), appeals from medical action

(Government Code Section 19253.5), appeals from Career Executive Assignment termination (Government Code Section 19889.2), and appeals from constructive medical termination, shall be entitled to conduct discovery in accordance with the provisions of Sections 57.2 – 57.4.

(c) The discovery provisions set forth in Sections 57.2 – 57.4 shall not apply to those cases scheduled for hearing or review by the Executive Officer or a Board hearing officer, to informal hearings conducted by Board administrative law judges pursuant to Government Code Section 11445.10 et seq., to those cases assigned to hearing before a Board administrative law judge pursuant to the provisions of Section 52(b), to appeals from termination of Limited Term employees pursuant to Section 282, to appeals from termination of a Limited Examination and Appointment Program appointment pursuant to Section 547.57, or to any other appeal or complaint excluded from the formal evidentiary hearing process pursuant to statute or regulation.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; and Sections 8547.8, 11445.10 et seq., 18670, 18671, 18672, 18672.1, 18673, 18675, 19173, 19175, 19253.5, 19574, 19574.1, 19574.2, 19575, 19585, 19590, 19683, and 19700-19706, and 19889.2, Government Code.

§ 57.2. Request for Discovery; Statements; Writings; Investigative Reports; Witness List.

(a) Each party to the an appeal or complaint listed in Section 57.1(a) or (b) is entitled to serve a request for discovery on any other named party to the complaint or appeal as allowed by subdivisions (c) - (e), and Government Code Section 18673. All requests for discovery shall be made no later than ~~36~~ 40 days prior to the initial hearing date, except upon a petition and showing of good cause by the party seeking discovery, and a finding by the administrative law judge, in his or her sole discretion, that such additional or late requests for discovery should be permitted in the furtherance of justice. For purposes of this section, the term "party" is defined as the person, ~~to include or appointing powers, filing the appeal or complaint, any named respondent, and his or her their designated legal representative, as well as any person, to include appointing powers, specifically identified in the appeal as a named respondent, and his or her designated legal representative.~~

~~(b) When an appeal is amended, all parties, other than the amending party, may serve a request for discovery on any other party to the appeal within 5 days of service of the amended appeal. Such requests for discovery shall be limited solely to those additional issues, if any, raised in the amended appeal. The administrative law judge may, in his or her discretion, extend the time period for requesting discovery under this subdivision upon a showing of good cause.~~

~~(eb) Each party to the appeal or complaint is entitled to request and receive from any other party to the appeal or complaint the names and home or business addresses of percipient witnesses to the event(s) in question, to the extent known to the other party, unless and of individuals who may be called as witnesses during the course of the hearing, except to the extent that disclosure of the address is prohibited by law.~~

~~Each party to the appeal is also entitled to request and receive from any other party to the appeal the names and addresses of individuals who may be called as witnesses to testify during the course of the hearing. The responding party may, in his or her discretion, provide either the home or business address of the witness, unless except to the extent that disclosure of the address is prohibited by law.~~

~~(dc)~~ Each party to the appeal or complaint is entitled to inspect and make a copy of any of the following in the possession, custody, or control of any other party to the appeal or complaint:

(1) Statements, as that term is defined in Evidence Code Section 225, of witnesses then proposed to be called as witnesses during the hearing by the party and of other persons having personal knowledge of the act, omission, event, decision, condition, or policy which are the basis for the appeal;

(2) All writings, as that term is defined in Evidence Code Section 250, that the party then proposes to enter into evidence;

(3) Any other writing or thing that is relevant to the appeal or complaint; and

(4) Investigative reports made by or on behalf of any party to the appeal or complaint pertaining to the subject matter of the proceeding, to the extent that these reports: (A) contain the names and home or business addresses of witnesses or other persons having personal knowledge of the facts, omissions or events which are the basis for the proceeding, unless disclosure of the address is prohibited by law, or (B) reflect matters perceived by the investigator in the course of his or her investigation, or (C) contain or include by attachment any statement or writing described in (A) to (C), inclusive, or summary thereof.

~~(e) For the purpose of this section, in those instances where an audio tape recording is provided, and all or portions of the tape are inaudible due to poor tape quality, the producing party shall, upon the request of the party requesting the discovery, provide a second, more audible, version of the tape recording, if possible. In those instances where a better quality tape recording does not exist, the producing party shall provide a copy of a written transcript of the tape recording, if such transcript exists. The producing party shall not be required to produce a copy of a written transcript for any requested tape recording, if such transcript does not already exist.~~

~~(fd)~~ All parties receiving a request for discovery shall produce the information requested, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production, within ~~12~~ 15 days of receipt of the discovery request, ~~or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production.~~

~~(g) Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.~~

~~(h) For purposes of this section, service may be accomplished by mailing the request for discovery to the home or business address of the party from whom discovery is sought. Each request for discovery shall have attached a proof of service.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
 Reference: Section 87164, Education Code; Sections 225 and 250, Evidence Code;
 and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-
 19706, Government Code.

§ 57.3. Petition to Compel Discovery.

~~(a) Any party claiming his or her request for discovery pursuant to Section 57.2 has not been complied with. A party may serve and file with the administrative law judge a petition to compel discovery, naming as responding party the any party who has refused or failed to comply with provide discovery as required by Section 57.2. A copy of the petition shall be served on the responding party on the same date the petition is filed with the administrative law judge. For purposes of this section, service may be effected on the responding party by mailing a copy of the petition to compel discovery, with proof of service attached, to the home or business address of the responding party.~~

(b) The petition shall state facts showing the responding party failed or refused to comply with Section 57.2, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under that section, that a reasonable and good faith attempt to contact the responding party for an informal resolution of the issue has been made, and the grounds of the responding party's refusal so far as known to the moving party.

~~(c) The petition shall be served upon the administrative law judge and responding party within 5 days after the responding party refused or failed to comply with the request, or within another time provided by stipulation, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the initial hearing date, except upon petition and determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.~~

~~(d) The responding party shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition to compel discovery. For purposes of this section, service may be effected on the petitioner by mailing a copy of the answer, with proof of service attached, to the home or business address of the petitioner.~~

~~(e) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.~~

~~(f) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition within 5 days of receipt of the responding party's answer to the petition to compel discovery or, if no answer is submitted, within 5 days of the date that such answer was due. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The parties may appear at any such hearing via telephone. The administrative law judge shall decide the petition on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.~~

~~(g) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is entitled to discover under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.~~

~~(h) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.~~

(c) (1) The petition shall be served upon the responding party and filed with the administrative law judge within 14 days after the responding party first evidenced his or her failure or refusal to comply with Section 57.2 or within 30 days after the request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the administrative hearing, except upon a petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay the commencement of the administrative hearing on the date set, and the possible prejudice of the action to any party.

(2) The responding parties shall have a right to file a written answer to the petition. Any answer shall be filed with the administrative law judge and served on the petitioner within 15 days of service of the petition.

(3) (A) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition within 20 days after the filing of the petition. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing shall be conducted prior to the issuance of a decision on the petition. The administrative law judge shall serve a copy of the order upon the parties by mail and/or by facsimile transmission.

(B) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from

disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

~~(id) A ruling of the administrative law judge concerning a motion to compel the production of evidence or to compel the attendance of a witness is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. Any party aggrieved by the decision of the administrative law judge concerning a motion to compel the production of evidence or to compel the attendance of a witness may, within 30 days of the service of the decision, file a petition to compel discovery in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. The hearing shall be continued pending resolution of any such interlocutory appeal.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Section 915, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

§ 57.4. Petition to Quash or for Protective Order.

(a) Any party claiming that a request for discovery pursuant to Section 57.2 is improper under that Section or is otherwise privileged or exempt for ~~from~~ discovery, may object to its terms by serving and filing with the administrative law judge and the party requesting the disputed discovery, a petition to quash or for a protective order. The petition shall state: (1) a description of the matters sought to be discovered; (2) the reason(s) why the matter is not discoverable under Section 57.2, or is otherwise privileged or exempt from discovery; and (3) that a reasonable and good faith attempt has been made to contact the requesting party and resolve the matter informally.

~~(b) The petition shall be served upon the administrative law judge and the party requesting discovery within 10 days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party. For purposes of this section, service may be effected on the party requesting discovery by mailing a copy of the petition, with proof of service attached, to the home or business address of the party requesting discovery.~~

~~(c) The party requesting discovery shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition to quash and/or for a protective order. For purposes of this section, service may be effected on the petitioner by mailing a copy of the answer, with proof of service attached, to the home or business address of the petitioner.~~

~~(d) Where the matter sought to be protected is in the possession, custody or control of the moving party, and the moving party asserts that the matter is not a discoverable matter under the provisions of Section 57.2, or is otherwise privileged or exempt from discovery, the administrative law judge may order lodged with him or her matters provided in Section 915(b) of the Evidence Code and examine the matters in accordance with those provisions.~~

~~(e) Unless otherwise stipulated by the parties, and as provided in this section, the administrative law judge shall review the petition and any response filed by the responding party and issue a decision granting or denying the petition within 5 days of receipt of the responding party's answer to the petition. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The parties may appear at any such hearing via telephone. The administrative law judge shall decide the case on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.~~

~~(f) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is not required to produce to the party seeking discovery under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production, if any, is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.~~

(b) (1) The petition shall be served upon the party seeking discovery and filed with the administrative law judge within 10 days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.

(2) The party requesting discovery shall have a right to file a written answer to the petition with the administrative law judge and served on the petitioner within 5 days of the service of the petition to quash and/or for a protective order.

(3) (A) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response and issue a decision granting or denying the petition within 20 days after the filing of the petition.

(B) The administrative law judge shall have the discretion to continue any evidentiary hearing or to conduct the hearing prior to the issuance of a decision on the petition.

(C) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(gc) A ruling of the administrative law judge concerning a petition to quash or for a protective order is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. Any party aggrieved by the decision of the administrative law judge concerning a motion to quash the production of evidence and/or for a protective order may, within 30 days of the service of the decision, file a petition to quash and/or for protective order in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. ~~The hearing shall be continued pending resolution of any such interlocutory appeal.~~

~~(h) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Section 915, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

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From: "Ashbrook, Debra" <Debra.Ashbrook@cdcr.ca.gov>
To: <bmonfross@spb.ca.gov>
Date: 8/22/2005 10:14:47 AM
Subject: Discovery Regulations

The Department has the attached recommendations for change to the State Personnel Board Discovery Regulations. The proposed changes apply the discovery regulations to all evidentiary hearings, including adverse actions.

Thank you for your consideration.

Debra L. Ashbrook

Assistant Chief Counsel

Employment Advocacy & Prosecution Team

Telephone: 916-322-4839

Cell phone: 916-712-6686

TITLE 2. ADMINISTRATION
 DIVISION 1. ADMINISTRATIVE PERSONNEL
 CHAPTER 1. STATE PERSONNEL BOARD
 SUBCHAPTER 1. GENERAL CIVIL SERVICE REGULATIONS
 ARTICLE 4. **HEARINGS AND APPEALS**

s 57.1. Discovery in Evidentiary Hearings ~~Other than Adverse Actions~~; Exclusive Provisions.

The provisions of Sections 57.2-57.4 provide the exclusive right to and method of discovery for evidentiary hearings conducted before the Board and/or Board administrative law judges, excluding those cases scheduled for hearing or review by the Executive Officer or a Board hearing officer, to informal hearings conducted by Board administrative law judges pursuant to Government Code Section 11445.10 *et seq.*, to those cases assigned to hearing before a Board administrative law judge pursuant to the provisions of Section 52(b), to appeals from termination of Limited Term employees pursuant to Section 282, to appeals from termination of a Limited Examination and Appointment Program appointment pursuant to Section 547.57, or to any other appeal or complaint excluded from the formal evidentiary hearing process pursuant to statute or regulation concerning appeals from discrimination (Sections 54 and 54.2), and when a petition for hearing is granted from the Notice of Findings issued in relation to a complaint of whistleblower retaliation (Sections 56-56.8). These provisions shall also apply when discrimination or retaliation is raised as an affirmative defense in an answer or appeal filed with the Board pursuant to the provisions of Section 51.2 concerning Notices of Adverse Action (Government Code Sections 19575 and 19590), Rejections During Probationary Period (Government Code Section 19175), Medical Actions (Government Code Section 19253.5), and Non Punitive Actions (Government Code Section 19585).

TITLE 2. ADMINISTRATION
 DIVISION 1. ADMINISTRATIVE PERSONNEL
 CHAPTER 1. STATE PERSONNEL BOARD
 SUBCHAPTER 1. GENERAL CIVIL SERVICE REGULATIONS
 ARTICLE 4. HEARINGS AND APPEALS

s 57.2. Request for Discovery; Statements; Writings; Investigative Reports; Witness List.

(a) Each party to ~~the~~ an appeal or complaint listed in Section 57.1(a) or (b) is entitled to serve a request for discovery on any other named party to the complaint or appeal as allowed by subdivisions (c)-(e) below, and Government Code Section 18673. All requests for discovery shall be made no later than ~~3640~~ days prior to the initial hearing date, except upon a petition and showing of good cause by the party seeking discovery, and a finding by the administrative law judge, in his or her sole discretion, that such additional or late requests for discovery should be permitted in the furtherance of justice. For purposes of this section, the term "party" is defined as the person, ~~to include or~~ appointing powers, filing the appeal or complaint, any named respondent, and his or her ~~their~~ designated legal representatives, ~~as well as any person, to include appointing powers, specifically identified in the appeal as a named respondent, and his or her~~ designated legal representative.

(b) ~~When an appeal is amended, all parties, other than the amending party, may serve a request for discovery on any other party to the appeal within 5 days of service of the amended appeal. Such requests for discovery shall be limited solely to those additional issues, if any, raised in the amended appeal. The administrative law judge may, in his or her discretion, extend the time period for requesting discovery under this subdivision upon a showing of good cause.~~

(be) Each party to the appeal or complaint is entitled to request and receive from any other party to the appeal or complaint the names and home or business addresses of percipient witnesses to the event(s) in question, to the extent known to the other party, and individuals who may be called as witnesses during the course of the hearing, except to the extent that unless disclosure of the address is prohibited by law. ~~Each party to the appeal is also entitled to request and receive from any other party to the appeal the names and addresses of individuals who may be called as witnesses to testify during the course of the hearing.~~ The responding party may, in his or her discretion, provide either the home or business address of the witness, except to the extent that unless disclosure of the address is prohibited by law.

(dc) Each party to the appeal or complaint is entitled to inspect and make a copy of any of the following in the possession, custody, or control of any other party to the appeal or complaint:

(1) Statements, as that term is defined in Evidence Code Section 225, of witnesses then proposed to be called as witnesses during the hearing by the party and of other persons

having personal knowledge of the act, omission, event, decision, condition, or policy which are the basis for the appeal;

(2) All writings, as that term is defined in Evidence Code Section 250, that the party then proposes to enter into evidence;

(3) Any other writing or thing that is relevant to the appeal or complaint; and

(4) Investigative reports made by or on behalf of any party to the appeal or complaint pertaining to the subject matter of the proceeding, to the extent that these reports: (A) contain the names and home or business addresses of witnesses or other persons having personal knowledge of the facts, omissions or events which are the basis for the proceeding, unless disclosure of the address is prohibited by law, or (B) reflect matters perceived by the investigator in the course of his or her investigation, or (C) contain or include by attachment any statement or writing described in (A) to (C), inclusive, or summary thereof.

~~(e) For the purpose of this section, in those instances where an audio tape recording is provided, and all or portions of the tape are inaudible due to poor tape quality, the producing party shall, upon the request of the party requesting the discovery, provide a second, more audible, version of the tape recording, if possible. In those instances where a better quality tape recording does not exist, the producing party shall provide a copy of a written transcript of the tape recording, if such transcript exists. The producing party shall not be required to produce a copy of a written transcript for any requested tape recording, if such transcript does not already exist.~~

~~(d~~f~~) All parties receiving a request for discovery shall produce the information requested, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production within 1215 days of receipt of the discovery request, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production.~~

(e) Not less than 10 days prior to the hearing on the merits, each party shall notify the other parties in writing of the identity and current work address of each expert witness to be presented as a witness at the hearing and a brief narrative statement of the qualifications of such witnesses and the general substance of the testimony which the witness is expected to give. At the same time, the parties shall also exchange all written reports prepared by such witnesses and each party shall have a reasonable opportunity to depose such witnesses. The administrative law judge may permit a party to call an expert witness not included on the list upon a showing of good cause. ~~(g) Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.~~

~~(h) For purposes of this section, service may be accomplished by mailing the request for~~

discovery to the home or business address of the party from whom discovery is sought.
Each request for discovery shall have attached a proof of service.

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STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR - LEGAL UNIT
2424 Arden Way, Suite 130
Sacramento, CA 95825-2400



Tel: (916) 263-2880
Fax: (916) 263-2887

Calmel: 8/435-2880
Calmel: 8/435-2887

TO FILE: THIS FAX COVER SHEET WAS USED TO SUBMIT COMMENTS TO
THE PROPOSED AMENDMENTS TO REGULATIONS CONCERNING
WHISTLEBLOWER COMPLAINT RETALIATIONS AND DISCOVERY
IN EVIDENTIARY HEARINGS AND ACCOUNTS FOR THE 21 PAGE TRANSMITTAL.

PERSONAL AND CONFIDENTIAL

FACSIMILE TRANSMISSION COVER SHEET

FAX NUMBER SENDING FROM: (916) 263-2887

FAX NUMBER SENDING TO: (916) 653-4256

**I AM TRANSMITTING 21 PAGES, INCLUDING THIS COVER SHEET.
IF THE TRANSMISSION IS INCOMPLETE, PLEASE CALL (916) 263-2880.**

TO: Bruce Monfross

FROM: Frank Nelson Adkins

DATE: August 22, 2005

RE:

MESSAGE: Per our discussion—comments on proposed regulations. I am sending only that portion of the text to which comments were made.

THANK YOU.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender, immediately, by telephone, and return the original message to the sender at the above address via the U.S. Postal Service.

**NOTICE OF PROPOSED REVISION OF REGULATIONS
AND STATEMENT OF REASONS
California Code of Regulations
Title 2. Administration
Division 1. Administrative Personnel
Chapter 1. State Personnel Board
Article 4. Hearings and Appeals**

DATE: July 8, 2005

**TO: ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND MEMBERS
OF THE GOVERNOR'S CABINET**

**SUBJECT: PROPOSED AMENDMENTS TO REGULATIONS CONCERNING
DISCOVERY IN NON-ADVERSE ACTION EVIDENTIARY HEARINGS
AUTHORITY:**

Under authority established in Government Code (GC) § 18701, the State Personnel Board (SPB) proposes to amend Title 2 of the California Code of Regulations (2CCR) §§ 57.1 through 57.4 which provide procedures for conducting discovery in non-adverse action evidentiary hearings before the five-member State Personnel Board (Board) or its designated representative. These discovery provisions apply to appeals relating to discrimination, denial of reasonable accommodation, and whistleblower retaliation complaints.

Comment: Also, applies to adverse actions when discrimination or retaliation raised as affirmative defense. See first bullet under "Informative Digest/Policy Statement Overview."

REFERENCE:

These regulations are amended to implement, interpret, and/or make specific GC §§ 8547.8, 19683, and 19700-19706.

PUBLIC HEARING:

Date and Time: August 30, 2005 from 10:00 to 10:30 a.m.
Place: The Westin Los Angeles Airport Hotel
Midway Room
5400 West Century Boulevard
Los Angeles, CA 90045
Purpose: To receive written or oral comments about this action.

WRITTEN PUBLIC COMMENT PERIOD:

The written public comment period will close Monday, August 22, 2005, at 5:00 p.m. This comment period allows time for SPB staff to provide copies of any written comments for the Board's consideration at the time of the hearing. Any person may submit written comments about the proposed amendments. To be

GC § 19683 authorizes SPB to investigate and conduct hearings concerning complaints of whistleblower retaliation filed by state employees or applicants for state employment.

GC §§ 19700-19706 authorizes SPB to investigate and conduct hearings concerning discrimination complaints filed by state employees or applicants for state employment who believe they have been discriminated against on the basis of age, blindness or color blindness, sex, race, religious creed, color, national origin, ancestry, marital status, physical disability, mental disability, or sexual orientation. The proposed revisions clarify that the discovery regulations will apply to cases scheduled for a formal evidentiary hearing before an SPB administrative law judge (ALJ) in the following circumstances:

- When discrimination or retaliation is raised as an affirmative defense during the course of an appeal from disciplinary action (GC §§ 19574 and 19590).

Comment: See above comment re affect of discovery regulations on adverse action proceedings.

- When an appeal from rejection during probationary period (GC § 19173), medical action (GC § 19253.5), non-punitive action (GC § 19585), denial of reasonable accommodation (GC § 19702), Career Executive Assignment termination (GC § 19889.2), or constructive medical termination is filed with SPB.

- When a complaint of discrimination (GC § 19702), or whistleblower retaliation (Education Code § 87164; GC §§ 8547.8 and 19683) is scheduled for a formal evidentiary hearing.

The proposed revisions also clarify that the discovery regulations will not apply to any other hearing, either formal or informal, conducted by SPB staff. All other revisions are of a technical or clarifying nature.

IMPACT ON SMALL BUSINESSES:

No impact on small businesses is anticipated from the implementation of the proposed amendment. Implementing the proposed amendment will affect only state departments and current and prospective employees of state departments.

LOCAL MANDATE:

SPB has determined that the proposed action imposes no mandate upon local agencies or school districts and therefore requires no reimbursement pursuant to G.C. § 17561.

COST ESTIMATES OF PROPOSED ACTION:

Proposed Discovery Regulations

REGULATIONS GOVERNING DISCOVERY IN EVIDENTIARY HEARINGS

For this amendment, text added to the regulation is indicated by underline and text deleted from the regulation is indicated by strikethrough.

TITLE 2. Administration

DIVISION 1. Administrative Personnel

CHAPTER 1. State Personnel Board

SUBCHAPTER 1. General Civil Service Regulations

ARTICLE 4. Hearings and Appeals

§ 57.1. Discovery in Evidentiary Hearings Other than Adverse Actions; Exclusive Provisions Before the Board or a Board Administrative Law Judge.

The provisions of Section 57.2 - 57.4 provide the exclusive right to and method of discovery for evidentiary hearings conducted before the Board and/or Board administrative law judges concerning appeals from discrimination (Sections 54 and 54.2), and when a petition for hearing is granted from the Notice of Findings issued in relation to a complaint of whistleblower retaliation (Sections 56 - 56.8). These provisions shall also apply when discrimination or retaliation is raised as an affirmative defense in an answer or appeal filed with the Board pursuant to the provisions of Section 51.2 concerning Notices of Adverse Action (Government Code Sections 19575 and 19590), Rejections During Probationary Period (Government Code Section 19175), Medical Actions (Government Code Section 19253.5), and Non-Punitive Actions (Government Code Section 19585).

(a) An employee who is served with a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19574 or 19590 shall be entitled to conduct discovery in accordance with the provisions of Government Code Sections 19574.1 and 19574.2. In those cases where an employee raises an affirmative defense alleging discrimination or retaliation when filing an answer to a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19575 or 19590, or in those cases where an employee raises an affirmative defense of retaliation or discrimination during the course of a hearing before the Board or a Board administrative law judge regarding an appeal from adverse action, the appointing power or any other named respondent shall be entitled to conduct discovery regarding any such affirmative defense in accordance with the provisions of Sections 57.2 - 57.4.

(b) Any party to any other type of action scheduled for hearing before the Board

Comment: Since subparagraph (a) is stricken, it is unclear what the "any other" refers to. To clarify, a sentence should be added that Sections 57.2 - 57.4 shall not apply to Notice of Adverse Actions except where discrimination is raised as an affirmative defense.

and/or a Board administrative law judge, including but not limited to, rejections during probationary period (Government Code Section 19173), discrimination complaints (Government Code Section 19702), appeals from denial of reasonable accommodation (Government Code Section 19702), whistleblower retaliation complaints (Education Code Section 87164, Government Code Sections 8547.8 and 19683), appeals from non-punitive action (Government Code Section 19585), appeals from medical action (Government Code Section 19253.5), appeals from Career Executive Assignment termination (Government Code Section 19889.2), and appeals from constructive medical termination, shall be entitled to conduct discovery in accordance with the provisions of Sections 57.2 - 57.4.

Comment: A sentence should be added that 57.2 - 57.4 applies to Adverse actions where discrimination is raised as an affirmative defense.

(c) The discovery provisions set forth in Sections 57.2 - 57.4 shall not apply to those cases scheduled for hearing or review by the Executive Officer or a Board hearing officer, to informal hearings conducted by Board administrative law judges pursuant to Government Code Section 11445.10 et seq., to those cases assigned to hearing before a Board administrative law judge pursuant to the provisions of Section 52(b), to appeals from termination of Limited Term employees pursuant to Section 282, to appeals from termination of a Limited Examination and Appointment Program appointment pursuant to Section 547.57, or to any other appeal or complaint excluded from the formal evidentiary hearing process pursuant to statute or regulation.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; and Sections 8547.8, 11445.10 et seq., 18670, 18671, 18672, 18672.1, 18673, 18675, 19173, 19175, 19253.5, 19574, 19574.1, 19574.2, 19575, 19585, 19590, 19683, and 19700-19706, and 19889.2, Government Code.

§ 57.2. Request for Discovery; Statements; Writings; Investigative Reports; Witness List.

(a) Each party to the ~~an~~ appeal or complaint listed in Section 57.1 (a) or (b) is entitled to serve a request for discovery on any other named party to the complaint or appeal as allowed by subdivisions (c) - (e), and Government Code Section 18673. All requests for discovery shall be made no later than ~~36~~ 40 days prior to the initial hearing date, except upon a petition and showing of good cause by the party seeking discovery, and a finding by the administrative law judge, in his or her sole discretion, that such additional or late requests for discovery should be permitted in the furtherance of justice. For purposes of this section, the term "party" is defined as the person, ~~to include or~~ appointing powers, filing the appeal or complaint, any named respondent, and ~~his or her~~ their designated legal representatives, ~~as well as any person, to include appointing powers, specifically identified in the appeal as a named respondent, and his or her designated legal representative.~~

Comment: There is an inconsistency with 57.1 which limits discovery to parties to an appeal "scheduled for hearing."

Comment: Should be changed to "(c) and (d)" because there is no "(e)" in the proposed revision.

(b) When an appeal is amended, all parties, other than the amending party, may serve a request for discovery on any other party to the appeal within 5 days of service of the amended appeal. Such requests for discovery shall be limited solely to those additional issues, if any, raised in the amended appeal. The administrative law judge may, in his or her discretion, extend the time period for requesting discovery under this subdivision upon a showing of good cause.

(c) Each party to the appeal or complaint is entitled to request and receive from any other party to the appeal or complaint the names and home or business addresses of percipient witnesses to the event(s) in question, to the extent known to the other party, unless and of individuals who may be called as witnesses during the course of the hearing, except to the extent that disclosure of the address is prohibited by law.

Each party to the appeal is also entitled to request and receive from any other party to the appeal the names and addresses of individuals who may be called as witnesses to testify during the course of the hearing. The responding party may, in his or her discretion, provide either the home or business address of the witness, unless except to the extent that disclosure of the address is prohibited by law.

(d) Each party to the appeal or complaint is entitled to inspect and make a copy of any of the following in the possession, custody, or control of any other party to the appeal or complaint:

(1) Statements, as that term is defined in Evidence Code Section 225, of witnesses then proposed to be called as witnesses during the hearing by the party, and of other persons having personal knowledge of the act, omission, event, decision, condition, or policy which are the basis for the appeal;

(2) All writings, as that term is defined in Evidence Code Section 250, that the party then proposes to enter into evidence;

(3) Any other writing or thing that is relevant to the appeal or complaint; and

(4) Investigative reports made by or on behalf of any party to the appeal or complaint pertaining to the subject matter of the proceeding, to the extent that these reports:

(A) contain the names and home or business addresses of witnesses or other persons having personal knowledge of the facts, omissions or events which are the basis for the proceeding, unless disclosure of the address is prohibited by law, or

Comments: The part of this section describing what a requesting party is entitled to does not address privileged or work product materials. Such materials are not discoverable as referenced in §57.3 (Petition to Compel Discovery), subsection (C)(3)(B): "Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, ..."

Comment: While the intent is clear, this provision will engender more discovery disputes than it is worth. The word "then" should be deleted and another sentence added: "The responding party shall amend this list no later than X days before hearing if it intends to call additional witnesses not previously disclosed."

Comment: It is unclear which party the proposed regulation refer to. It should be revised to state "by the requesting party" or "by the responding party," depending on the intent of the drafter.

Comments: Same comment as relates to subsection (1) directly above.

(B) reflect matters perceived by the investigator in the course of his or her investigation, or

(C) contain or include by attachment any statement or writing described in (A) to (C), inclusive, or summary thereof.

(e) For the purpose of this section, in those instances where an audio tape recording is provided, and all or portions of the tape are inaudible due to poor tape quality, the producing party shall, upon the request of the party requesting the discovery, provide a second, more audible, version of the tape recording, if possible. In those instances where a better quality tape recording does not exist, the producing party shall provide a copy of a written transcript of the tape recording, if such transcript exists. The producing party shall not be required to produce a copy of a written transcript for any requested tape recording, if such transcript does not already exist.

(f) All parties receiving a request for discovery shall produce the information requested, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the nonproduction, within 42 15 days of receipt of the discovery request, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the nonproduction.

Comments: Should clarify whether these are calendar or business days.

(g) Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

(h) For purposes of this section, service may be accomplished by mailing the request for discovery to the home or business address of the party from whom discovery is sought. Each request for discovery shall have attached a proof of service.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Sections 225 and 250, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

§ 57.3. Petition to Compel Discovery.

(a) Any party claiming his or her request for discovery pursuant to Section 57.2 has not been complied with. A party may serve and file with the administrative law judge a petition to compel discovery, naming as responding party the any party who has refused or failed to comply with provide discovery as required by Section 57.2. A copy of the petition shall be served on the responding party on the same date the petition is filed with the administrative law judge. For purposes

hearing via telephone. The administrative law judge shall decide the petition on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.

(c) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is entitled to discover under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(h) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.

(c)(1) The petition shall be served upon the responding party and filed with the administrative law judge within 14 days after the responding party first evidenced his or her failure or refusal to comply with Section 57.2 or within 30 days after the request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the administrative hearing, except upon a petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay the commencement of the administrative hearing on the date set, and the possible prejudice of the action to any party.

(2) The responding parties shall have a right to file a written answer to the petition. Any answer shall be filed with the administrative law judge and served on the petitioner within 15 days of service of the petition.

(3) (A) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition within 20 days after the filing of the petition. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing shall be conducted prior to the issuance of a decision on the petition. The administrative law judge shall serve a copy of the order upon the parties by mail and/or by facsimile transmission.

(B) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law

Comment: As drafted, the ALJ has to issue a decision within 20 day of the filing of the petition. This has the effect of cutting responding party's time for response to 5 days (instead of the stated 15 days); responding party has 15 days from service of the petition to respond to it. See subsection (c)(2) directly above. This anomaly appears in Government Code section 19574.2 after which the regulation is patterned.

Comments: Unclear whether the "evidentiary hearing" provided for here would be on the discovery petition or the underlying matter.

Judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(c) A ruling of the administrative law judge concerning a motion to compel the production of evidence or to compel the attendance of a witness is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. Any party aggrieved by the decision of the administrative law judge concerning a motion to compel the production of evidence or to compel the attendance of a witness may, within 30 days of the service of the decision, file a petition to compel discovery in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. The hearing shall be continued pending resolution of any such interlocutory appeal.

Comment: Change "motion" to "petition."

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Section 915, Evidence Code; and Sections 8647.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 18700-18706, Government Code.

§ 57.4. Petition to Quash or for Protective Order.

(a) Any party claiming that a request for discovery pursuant to Section 57.2 is improper under that Section or is otherwise privileged or exempt from discovery, may object to its terms by serving and filing with the administrative law judge and the party requesting the disputed discovery, a petition to quash or for a protective order. The petition shall state:

- (1) a description of the matters sought to be discovered;
- (2) the reason(s) why the matter is not discoverable under Section 57.2, or is otherwise privileged or exempt from discovery; and
- (3) that a reasonable and good faith attempt has been made to contact the requesting party and resolve the matter informally.

(b) The petition shall be served upon the administrative law judge and the party requesting discovery within 10 days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has

whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.

(2) The party requesting discovery shall have a right to file a written response to the petition with the administrative law judge and served on the petitioner within 5 days of the service of the petition to quash and/or for a protective order.

(3) (A) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response and issue a decision granting or denying the petition within 20 days after the filing of the petition.

(B) The administrative law judge shall have the discretion to continue any evidentiary hearing or to conduct the hearing prior to the issuance of a decision on the petition.

(C) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(cc) A ruling of the administrative law judge concerning a petition to quash or for a protective order is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. Any party aggrieved by the decision of the administrative law judge concerning a motion to quash the production of evidence and/or for a protective order may, within 30 days of the service of the decision, file a petition to quash and/or for protective order in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. The hearing shall be continued pending resolution of any such interlocutory appeal.

Comment: "Motion" should be changed to "petition."



MEMORANDUM

Date: September 15, 2005

To: Members of the State Personnel Board

From: Dorothy Bacskai Egel, Senior Staff Counsel
State Personnel Board

Reviewed: Elise S. Rose, Chief Counsel
State Personnel Board

Subject: **PSC No. 05-04:** Appeal of the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) from the Executive Officer's April 1, 2005 Approval of a Contract for Legal Services between the Secretary of State's Office and Renne & Holtzman Public Law Group, LLP

REASON FOR HEARING

The California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) has appealed to the State Personnel Board (SPB or Board) from the Executive Officer's decision dated April 1, 2005 approving a personal services contract for legal services between the Secretary of State's Office (SOS) and Renne & Holtzman Public Law Group, LLP (Renne). The term of the Contract was from December 1, 2003 through December 31, 2004 and the original amount was for \$70,000. The Contract was amended in May 2004 to add an additional \$150,000 to the original amount, for a total of \$220,000. The end date of the amended Contract remained December 31, 2004. CASE's appeal challenges only the amended portion of the Contract. (A copy of the Executive Officer's decision is attached hereto as Attachment 1.)

BACKGROUND

According to Renne, SOS contracted with Renne to obtain legal advice regarding the implementation in California of the federal Help America Vote Act (HAVA), particularly with respect to local government issues. Much of this advice concerned the

decertification and recertification of direct recording electronic (DRE) voting systems, and litigation surrounding the installation of electronic voting systems by a contractor, Diebold Election Systems. CASE asserts that this work can be done adequately and competently by civil service employees.

PROCEDURAL HISTORY

By letter dated September 15, 2004, pursuant to Government Code section 19132 and SPB Rule 547.59 et seq., CASE requested SPB to review the contract for legal services between SOS and with Renne for compliance with Government Code section 19130, subdivision (b).

On November 15, 2004, SOS submitted its response to CASE's review request.

On November 29, 2004, CASE submitted its reply.

On November 24, 2004, pursuant to SPB Rule 547.68, Renne filed a motion to intervene as a party in this matter.

On December 9, 2004, the Executive Officer granted Renne's motion to intervene.

On January 4, 2005, Renne submitted its response to CASE's review request.

On January 11, 2005, CASE submitted its reply to Renne's response.

On April 1, 2005, the Executive Officer issued his decision approving the Contract. (Attachment 1)

APPEAL BRIEFS

By letter dated April 18, 2005, CASE appealed to the Board from the Executive Officer's decision.

CASE filed its opening brief dated May 13, 2005. (Attachment 2)

SOS submitted a letter dated July 7, 2005 stating that it would not file a brief on appeal to the Board. (Attachment 3)

Renne filed its response dated June 23, 2005. (Attachment 4)

In its response, Renne incorporated by reference its prior pleadings and specifically referenced the Declaration of Jonathan Holtzman (Attachment 5)

CASE filed its reply dated July 5, 2005. ([Attachment 6](#))

ISSUE

This matter presents the following issue for the Board's review:

Has SOS provided sufficient justification to show that the Contract is justified under Government Code section 19130, subdivision (b)(10)?

SUMMARY OF POSITIONS

The parties' full arguments on these issues are contained in the Attachments and the Board's file. Set forth below is a summary of their arguments.

SPB's Jurisdiction

Government Code section 19132 provides:

The State Personnel Board, at the request of an employee organization that represents state employees, shall review the adequacy of any proposed or executed contract which is of a type enumerated in subdivision (b) of Section 19130. The review shall be conducted in accordance with subdivision (c) of Section 10337 of the Public Contract Code.

Government Code section 19130(b)(3) authorizes a state agency to enter into a personal services contract with a private contractor when:

The services contracted are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system.

Government Code section 19130(b)(5) authorizes a state agency to enter into a personal services contract with a private contractor when:

The legislative, administrative, or legal goals and purposes cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system. Contracts are permissible under this criterion to protect against a conflict of interest or to insure independent and unbiased findings in cases where there is a clear need for a

different, outside perspective. These contracts shall include, but not be limited to, obtaining expert witnesses in litigation.

Government Code section 19130(b)(7) authorizes a state agency to enter into a personal services contract with a private contractor when:

State agencies need private counsel because a conflict of interest on the part of the Attorney General's office prevents it from representing the agency without compromising its position. These contracts shall require the written consent of the Attorney General, pursuant to Section 11040.

Government Code section 19130(b)(10) authorizes a state agency to enter into a personal services contract with a private contractor when:

The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

CASE's Position

CASE asserts that the decision of the Executive Officer should be reversed because the information presented by SOS and Renne does not establish that Renne's services were urgently needed and could not have been provided under the civil service. CASE asserts that the claimed series of events that converged to make Renne's services urgent and necessary all occurred well before the amended contract was entered into in May or June 2004, and that neither SOS nor Renne have shown that Renne provided any services subsequent to the amendment of the contract that were urgent or could not have been performed by civil service attorneys. Moreover, given the extension of the HAVA implementation date to January 1, 2006, there is no showing that SOS could not have obtained civil service attorneys to perform the work in question. Finally, CASE asserts that neither SOS nor Renne have established specifically what services were performed by Renne during the period of the amended contract that were urgent and justify approval of the Contract under Government Code section 19130(b)(10).

SOS's Position

By letter dated July 7, 2005, SOS stated that the term of the contract both began and ended during the administration of former Secretary of State Kevin Shelley, and that a brief was submitted in support of the contract by counsel for the former Secretary. SOS further stated that the current administration of Secretary of State Bruce McPherson has no additional information to provide to the SPB in this matter.

Renne's Position

Renne asserts that the decision of the Executive Officer should be sustained because it correctly determined that the services were urgent and necessary within the meaning of Government Code section 19130(b)(10). Specifically, Renne asserts that, during the period of April 2004 through August 2004, the SOS was facing legal battles on a number of fronts, and was doing so with a severely depleted legal staff. There was a large amount of critically time-sensitive legal work related to the recertification of all direct electronic voting (DRE) systems, defending the SOS's authority regarding the certification and decertification of voting systems, and resolving false claims litigation involving Diebold Election Systems. Renne further asserts that the Declaration of Jonathan Holtzman (included herein as Attachment 5) describes the nature of the services performed by Renne after April 2004, including the recertification of voting systems from June 2004 through August 2004, litigation resulting in an upholding SOS's authority to decertify voting systems, and the resolution of the Diebold litigation in December 2004.

Executive Officer's Decision

In his April 1, 2005 Decision, the Executive Officer determined that the Contract should be approved as an "urgency" contract under Government Code section 19130, subdivision (b)(10). The Executive Officer concluded that SOS and Renne have provided sufficient information to show that SOS urgently needed legal counsel not only to represent it in court, but also to provide strategy and policy guidance to the Secretary in order to determine how to proceed with respect to electronic voting and to direct the Attorney General's Office in defending SOS in litigation. The Executive Officer further determined that the services could not have been provided in a timely fashion under the civil service. Because he found that the Contract was justified under Government Code section 19130, subdivision (b)(10), the Executive Officer did not address the other objections raised by CASE in its submissions or the other grounds relied upon by SOS and Renne.

ATTACHMENT INDEX

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ATTACHMENTS FOR
THE HEARING ITEMS
ARE AVAILABLE UPON
REQUEST BY
CONTACTING THE
SECRETARIAT OFFICE
AT: (916) 653-0429 OR
TDD (916) 654-2360

STATE PERSONNEL BOARD

NON-HEARING CALENDAR

RE: BOARD DATE OCTOBER 3, 2005

(Cal; 10/03/05)

MEMO TO : STATE PERSONNEL BOARD
FROM : KAREN COFFEE, Chief, Merit Employment and
Technical Resources Division
SUBJECT : Non-Hearing Calendar Items for Board Action

The staff has evaluated these items and recommend the following actions be taken:

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A. The Prison Industry Authority proposes to make revisions to the Definition, Typical Tasks, Minimum Qualifications and Knowledge, Skills and Abilities sections to the Sales Order classification.	201
B. The Secretary of State's Office proposes to return delegated examination and open temporary appointment (TAU) authorization to the Secretary of State's Office and rescind the requirement for SPB review and oversight of all examinations and open TAU appointments.	204

TO: STATE PERSONNEL BOARD

FROM: SARA HULL, Staff Personnel Program Analyst
Department of Personnel Administration

REVIEWED BY: JOSIE FERNANDEZ, Section Manager
Department of Personnel Administration

SUBJECT: Proposed specification revisions to the Sales Order Supervisor classification.

SUMMARY OF ISSUES:

The Prison Industry Authority (PIA) is requesting changes to the specification for the classification of Sales Order Supervisor. Specifically, PIA is requesting to broaden the definition of the classification to permit management to utilize the classification for better future organizational needs. In addition, PIA proposes to update the Typical Tasks to more clearly reflect those duties performed by incumbents in the Sales Order Supervisor class.

Finally, PIA is requesting to modify the Minimum Qualifications (MQ's) for the Sales Order Supervisor classification. Currently, the MQ's for the class are restrictive and prevent upward mobility for PIA and other State employees. Under the proposed MQ's, the requirement for one-year of supervisory experience would be deleted. Since this is an entry level supervisory classification, realistically, incumbents new to the class do not need prior supervisory experience. Supervisory experience should/would be gained during the classes'12-month probationary period.

CONSULTED WITH:

KAREN BARR, Prison Industry Authority
DAN KNIPP, Prison Industry Authority
JENNIFER ROCHE, State Personnel Board
FRANK MARR, Department of Personnel Administration

The Department of Personnel Administration has notified the California State Supervisors association in writing of this proposal.

CLASSIFICATION CONSIDERATIONS:

See attached.

RECOMMENDATIONS:

That the proposed revised specifications for the class of Sales Order Supervisor as shown in this calendar be adopted.

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CALIFORNIA STATE PERSONNEL BOARD
SPECIFICATION

Schematic Code: QZ76
Class Code: 7147
Established: 6/23/66
Revised: 1/1/83
Title Changed: --

SALES ORDER SUPERVISOR

DEFINITION

Under general direction ~~of the Sales Manager, Prison Industries, to~~ the incumbents in this classification direct the operations of the sales order staff; ~~to~~ coordinate sales order activities with the operations of Prison Industries factories; ~~to~~ perform varied sales promotion support and customer service tasks; and ~~to~~ do other related work.

TYPICAL TASKS

Directs and supervises the operations of the customer services sales order unit; ~~develops sales prospectuses and proposals; coordinates with representatives of public agencies the exhibiting of Prison Industries products;~~ maintains liaison with institutional industries personnel to coordinate sales commitments ~~with production and storage status; makes commitments to purchasers on delivery dates; coordinates the scheduling of field visits of Sales Representatives;~~ receives, analyzes, and takes appropriate action on customer complaints; establishes procedures to update and maintain customer mailing lists; ~~schedules mass mailings of sales literature;~~ receives and writes sales orders received directly from customers; ~~meets with customers who visit Prison Industries headquarters to show products and discuss merits of products; decides what products may be substituted for items listed on bid requests; reviews and signs bids;~~ makes recommendations on new products to meet demands of customers; provides sales and product service contacts with ~~Sacramento~~ agencies as required; arranges for product samples, information on product changes, price changes, and related administrative support to Sales Representatives; ~~contacts engineering personnel and factory personnel to obtain cost information on special customer orders;~~ prepares correspondence to staff of the department and purchasers regarding products, sales orders, commitments, and adjustments; establishes procedures for record keeping of purchases, waivers, and special pricing; reviews staff assignments and adjusts workload as appropriate; conducts all aspects of supervision and personnel-related activities and develops procedural manuals for sales order work; and prepares reports.

MINIMUM QUALIFICATIONSEither I

Experience: Two years of technical experience in processing sales orders ~~in for~~ an enterprise producing several lines of products manufactured at different locations, ~~at least one year of which must have been in a supervisory capacity.~~

and

Education: Equivalent to graduation from college. (Additional qualifying experience may be substituted for the required education on the basis that one year of experience equals two years of education.)

Or II

Experience: One year of experience as a Staff Services Analyst, Range C.

KNOWLEDGE AND ABILITIES

Knowledge of: Processing sales orders; problems of coordinating production and delivery schedules; rules and regulations regarding the sale of Prison Industries products; supervisory principles and practices; office organization and practices; the department's ~~Affirmative Action~~ Equal Employment Opportunity Program objectives; a manager's role in the ~~Affirmative Action~~ Equal Employment Opportunity Program and the processes available to meet ~~affirmative action~~ equal employment opportunity objectives.

Ability to: Plan and direct the work of others; establish and maintain good working relationships with people contacted in course of work; ~~speak and write~~ communicate effectively; develop distribution channels for Prison Industries products; coordinate operations of a headquarters unit with field personnel; analyze situations and adopt an effective course of action; effectively contribute to the department's ~~affirmative action~~ equal employment opportunity objectives.

(Cal. 10/03/05;)

TO: STATE PERSONNEL BOARD

FROM: DAPHNE BALDWIN, Manager
Policy Division

REVIEWED BY: LAURA AGUILERA, Assistant Executive Officer
Executive Office

CAROL ONG, Manager
Policy Development

SUBJECT: PROPOSAL TO RETURN DELEGATED EXAMINATION AND
OPEN TEMPORARY APPOINTMENT (TAU) AUTHORIZATION TO
THE SECRETARY OF STATE'S OFFICE AND RESCIND THE
REQUIREMENT FOR SPB REVIEW AND OVERSIGHT OF ALL
EXAMINATIONS AND OPEN TAU APPOINTMENTS

SUMMARY OF ISSUES:

The Secretary of State's Office (SOS) has requested reconsideration of the rescinding of their delegated examination and open temporary appointment (TAU) authorization and that SOS no longer be required to seek prior State Personnel Board (SPB) review and approval for its future examinations and open TAU appointments.

BACKGROUND:

As a result of a public hearing held on February 8, 2005, the five-member State Personnel Board (Board) rescinded SOS's authorization to administer examinations on a decentralized basis and make open TAU appointments. This decision resulted in a requirement that SPB review and approve all examinations and open TAU appointments proposed by SOS for a two-year period of time (February 8, 2005, through February 7, 2007). The action was taken as a result of SPB's final personnel audit report of SOS's personnel practices, policies, and processes, that identified the department's failure to maintain sufficient documentation in its examination and appointment files to demonstrate that it consistently complied with civil service laws, rules, and merit principles, as well as other improprieties and deficiencies.

SOS has requested SPB to reconsider returning its delegated examination and open TAU authorization on a current basis. SOS has indicated changes to many of their executive level staff, as well as a commitment from the department towards resolving any outstanding personnel issues.

SUMMARY OF FINDINGS

During the period from February through September 2005, SPB monitored and reviewed eight examinations administered by SOS. Staff's review included an assessment of SOS examination processes, including the extent to which SOS complied with State laws, regulations, and merit principles. SPB reviewed examination bulletins, examination publicity, selection instruments, rating criteria, scoring methods, and resulting eligible lists.

SOS examinations were administered satisfactorily; there were no indications of irregularities in the administration of the examinations. During the review period, SPB did not receive any open TAU appointment requests from SOS. SOS has indicated a commitment to maintain sufficient examination and appointment documentation in its files. In addition, SOS has provided updates to ensure compliance with the directives and action items set forth in the audit.

APPLICABLE LAW:

Article VII, section 1, subdivision (b) of the California Constitution provides:

In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination.

Government Code § 18900, subdivision (a) provides:

Eligible lists shall be established as a result of free competitive examinations open to persons who lawfully may be appointed to any position within the class for which these examinations are held and who meet the minimum qualifications requisite to the performance of the duties of that position as prescribed by the specifications for the class or by board rule.

Government Code § 19058, provides:

When there is no employment list from which a position may be filled, the appointing power, with the consent of the board, may fill the position by temporary appointment...When temporary appointments are made to permanent positions, an appropriate employment list shall be established for each class to which a temporary appointment is made before the expiration of the appointment.

ISSUES:

The following issues are before the Board:

Should the Board exercise its authority pursuant to Article VII, section 1(b) of the California Constitution and Government Code §§ 18900 and 19058 to:

1. Return delegated authority to SOS to conduct examinations

2. Return delegated authority to SOS to make open TAU appointments,

Such actions would result in no longer requiring that SPB review and oversee the identified transactions.

RECOMMENDATION:

SPB staff recommends that the Board adopt the following resolution restoring SOS's delegation and open TAU appointment authorization, and no longer requiring SPB review and oversight of these functions.



In the Matter of

SECRETARY OF STATE'S OFFICE

Seeking the return of delegated examination and open temporary appointment (TAU) authorization to the Secretary of State's Office and rescind the requirement for SPB review and oversight of all examinations and open TAU appointments

**DECISION APPROVING
RESTORATION OF THE SECRETARY
OF STATE'S DELEGATED EXAMS
AND OPEN TAU APPOINTMENT
AUTHORITY AND RESCINDING OF
SPB'S REQUIRED OVERSIGHT**

WHEREAS, Article VII, section 1(b) of the California Constitution provides, "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination"; and

WHEREAS, Government Code § 18900, subdivision (a) provides, "Eligible lists shall be established as a result of free competitive examinations open to persons who lawfully may be appointed to any position within the class for which these examinations are held and who meet the minimum qualifications requisite to the performance of the duties of that position as prescribed by the specifications for the class or by board rule"; and

WHEREAS, Government Code § 19058 provides, "When there is no employment list from which a position may be filled, the appointing power, with the consent of the board, may fill the position by temporary appointment...When temporary appointments are made to permanent positions, an appropriate employment list shall be established

for each class to which a temporary appointment is made before the expiration of the appointment;" and

WHEREAS, in Article VII, section 3(a) of the California Constitution, the people of California entrusted the oversight of the merit principle and enforcement of the civil service laws to the State Personnel Board (SPB); and

WHEREAS, on February 8, 2005, the five-member State Personnel Board rescinded the Secretary of State's Office (SOS) authorization to administer examinations on a delegated basis and make open temporary appointments (TAU), and required that SPB staff review and approve all examinations and open TAU appointments proposed by SOS from February 8, 2005, through February 7, 2007; and

WHEREAS, SOS has requested return of their delegated examination and open TAU authorization and has shown a commitment to conform to acceptable standards and thresholds; and

WHEREAS, SPB has reviewed and approved examinations administered by SOS, and each one reviewed included an assessment of SOS's examination processes, the extent to which SOS complied with State laws, regulations, and merit principles; and

WHEREAS, SOS's examinations were administered satisfactorily; and

WHEREAS, SOS has indicated a commitment to maintain sufficient examination and appointment documentation in its files;

THEREFORE, BE IT RESOLVED AND ORDERED, that:

Effective October 3, 2005,

1. The authority of SOS to administer its examinations on a decentralized basis and make open TAU appointments without prior SPB review be restored.
2. SPB's Merit Employment and Technical Resources Division will no longer be required to monitor examinations given by SOS.
3. SPB's Policy Division will no longer be required to review all open TAU requests from SOS.

STATE PERSONNEL BOARD

William Elkins, President
Maeley Tom, Vice President
Ron Alvarado, Member
Sean Harrigan, Member
Anne Sheehan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision and Order at its meeting on October 3, 2005.

DATED: _____

Executive Officer
State Personnel Board